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The Grounds of Territory

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The Grounds of Territory

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*A thesis submitted to the School of Law of King's College London
for the degree of Doctor of Philosophy
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Abstract

With this thesis I have made some order within the growing literature on territorial rights, and I have provided one alternative approach that addresses the problems revealed by existing theories. I have developed a proposal that draws in the strongest arguments provided by the literature. The existing literature shares the intuition that territorial rights are accorded to protect individuals' fundamental interests in developing and pursuing their separate and collective goals. My proposal also appeals to this principle and makes it the central focus of a theory of territorial rights.

In the first part of this work I offer an account of the existing theories and show the problems that each view carries. I explain that they either fail to address the particularity requirement or they incur in the *in rem* problem, and I propose possible solutions to make the authors' strategies more appealing. In the second part I propose a conventionalist theory constrained by a legitimacy threshold. I argue that communities acquire territorial rights if these rights are determined by their social norms. Social norms have the role of ratifying the expectations of the community's members and promote peaceful and stable social relations, even when they are unjust and illiberal. However, a community may demand exclusive titles to territory only if its system of norms meets four requirements of legitimacy. The community holds exclusive titles regarding territory only to the extent that these titles are necessary for maintaining a system of norms that is legitimate. I apply my proposal to the case of secession and show that the parties to a conflict over territory ought to recognize a reciprocal duty to compromise. My theory endorses a political conception of territorial rights that are determined by the interaction of communities and by the resolution of conflicts.

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This thesis is dedicated to Marco, my baby.

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Chapter One - Introduction

Territorial rights are at the core of many current international and internal conflicts: secessionist movements have to do with the control of a contested territory; the lives of people in resource rich countries are endangered by oppressive governments that exploit the resource curse; the international community soon will face the crisis of environmental refugees; and international relations are already strained by the current refugee crisis, the cause of which in part has to do with political groups fighting for the control of natural resources and land.

These complex issues are closely associated with the theoretical uncertainty obscuring the reasons why some agents' interests in territory should be worthy of special protection. Disagreements, as often happens, are exacerbated by the lack of clarity on the matter of contention and on the demands parties are permitted to make against each other. A theory of territorial rights must offer such clarity and standards to evaluate the permissibility of territorial demands. This work offers a view on whether current territorial holdings are legitimate, and whether those who challenge them have spotted a fundamental limitation in our current assumptions regarding national states' territorial possessions and the distribution of land.

One may ask whether we could sufficiently address territorial issues with a nuanced theory of political authority. Control over territory is ultimately control over what people can or cannot do with and within it. However, territorial rights confer a special kind of authority and, similarly to property rights, they deserve a theory carved specifically for them. Rights on territory and resources are, indeed, normative incidents that regulate people's behavior, but they focus specifically on the conditions under which the use of land and resources is permitted, and the conditions under which the right holder can legitimately exclude others from the enjoyment of a particular territory and the resources within it.

The focus on territory makes this a limited work. Just like a theory of property rights does not offer a comprehensive view on political justice, a theory of territorial rights will leave unexamined many issues, such as our obligations to the global poor, or the limits of political authority over people. The subject of this work is limited to the

order of territorial rights, which, I argue, protects chiefly the value of stability and peace. Throughout the following chapters, I will mention how my proposal may affect our theories regarding these fundamental questions. Nevertheless, my proposal constitutes only a brick of a bigger theoretical structure that will have to address other difficult moral questions. For now, I only wish to offer a new perspective on territorial rights to unravel the existing assumptions about rights and their role in territorial disputes, and about states and political organizations, that I believe are holding our moral and political capacity back.

1 The Proposal

I propose that a community has territorial rights when these rights are specified by conventions. The territorial rights thus acquired are protected by immunities against competing powers and by claims that others do not interfere with the enjoyment of these rights in so far as the conventions meet some minimal requirements of legitimacy, and to the extent that the protective claims and immunities are necessary to maintain that minimum level of legitimacy. This proposal carves a very small space for exclusive rights to territory and resources, and it is in contrast with existing international law on the territorial privileges of nation states. However, I show that my theory is largely in harmony with international practice, and I provide examples that I hope will demonstrate that the legitimacy-based conventionalism that I develop is not unfeasible.

I believe that a theory of territorial rights must take seriously the effect that the use and control of a territory and its resources have on the lives of individuals, but also that its solutions to territorial conflicts must be sustainable and realistic. Our interest in issues regarding territorial rights emerges importantly not only from the pursuit of theoretical rigor, but especially from the awareness that conflicts on territory and resources have for long infected our chances for a peaceful system of international relations. A theory of territorial rights must have a wide applicability, and it must appeal to as many actors as possible, without losing sight of its commitment to justice.

In light of this, I suggest that groups' territorial rights are accorded chiefly for the protection of their members' fundamental interest in individual self-government, which relies on the stability of expectations and possessions and on the protection of basic fundamental rights. More extensive freedoms to use resources found within a community's borders and extensive powers of territorial jurisdiction may be acquired on the basis of more inclusive values, such as self-determination or national security. However, I argue that a group may assert protective claims and immunities in protection of these freedoms and powers only if exclusive territorial rights are necessary to secure a minimal standard of legitimacy. I believe that legitimacy is a composite standard that can be achieved by meeting different requirements in a variety of satisfactory combinations, and that is sensitive to community specific values and narratives regarding groups' attachment to territory. The fulfillment of the requirements of legitimacy must be assessed empirically, with reference to the complex and rich knowledge we have achieved in the fields of political economy, sociology, legal studies, and the like. I will argue that this concept of legitimacy makes my proposal acceptable to many diverse communities.

This thesis was written for those who uphold liberal principles of individual freedom. It offers a view on what liberalism tells us about how we should treat others when our relations with them are affected by territorial conflicts, whether the conflict involves fellow liberals or not. However, in some important ways, this thesis is also written for non-liberals, and it aims to offer them reasons to accept a system of international legitimacy of territorial holdings and solutions to territorial conflicts that will satisfy their liberally minded opponents. I offer in fact a minimalist theory of territorial rights, which leaves ample space for debate on grounds that do not appeal necessarily to principles of individual freedom and equality.

This is above all a thesis about rights. The focus is on rights not because they are the only moral consideration that one should make regarding territory. There are principles, aims, and values that do not properly fit within a theory of territorial rights but that play an important role in determining our actions. Rights are also not the final result of the moral calculations that we ought to make when confronted with territorial conflicts. They cannot resolve all conflicts, and there can in fact be conflicts regarding competing rights. Rights are in some important sense only one of

the products of our moral deliberations, and they are one step towards the resolution of disputes. Like many other complex fields of human interaction, territorial disputes lie on an intricate moral background, which requires a sensible approach to rights, but also to goals, principles, and values, if we are to find reasonable and sustainable solutions.

Nevertheless, if solutions violate people's rights, they will certainly be considered less than satisfactory. Rights after all are the strongest moral protection that we can give to an agent's interest, and they are invoked as a dependable assertion of one's role in society. This makes it all the more important that we avoid the unnecessary proliferation of rights, which may make territorial conflicts more likely to threaten people's entitlements. Overcrowding international relations with territorial rights would certainly increase the chance that solutions to territorial conflicts may never be entirely acceptable. Thus, it is imperative that we avoid dispensing rights that are not firmly grounded in theory. This thesis is an attempt to find the proper place for rights in the debate on territory to increase our chances for the fair and sustainable resolution of disputes.

2 Outline of the Thesis

To understand the complex system of titles that diverse communities may have with regards to territory, it is useful to distinguish the different normative incidents that make up our understanding of territorial rights. In Chapter 2 I offer a conceptual analysis of territorial rights and divide them into a list of normative incidents using the Hohfeldian analysis. I show that when we speak about territorial rights in general, we refer to a set of claims, freedoms, powers, and immunities that have to do principally with an agent's control of land and territory. In particular I distinguish between powers to control and freedoms to use a territory, and the immunities and claims that protect these powers and freedoms. I also explain why I focus on the issue of territorial jurisdiction over people regarding territory and resources and not on every aspect of political authority over people within particular borders.

In Chapter 3 and 4 I address the existing theories of territorial rights. I try to offer a sympathetic account of these theories and I show as neatly as possible the problems that each strategy carries. I explain the reasons why the theories discussed fail to address the issue of territorial rights, and I propose possible solutions to make the authors' strategies more appealing. I identify two major problems with the literature: the *in rem* problem and the failure to address the particularity requirement. The *in rem* problem and the particularity requirement demand that a theory of territorial rights is able to identify the primary holder of territorial jurisdiction within a particular geographical location. Failure to do that makes a theory unfit to address the most fundamental requirements of a theory of territorial holdings and to provide a solution to territorial disputes.

I divide the theories in direct and indirect, and show that the direct approach to territorial rights is to be preferred. Direct theories maintain that an agent acquires jurisdictional powers regarding territory and resources because these powers in themselves protect the agents' fundamental interests. For some direct theories, territorial jurisdiction regarding resources protects individuals' interests in self-government, or happiness; for others it realizes the value of collective self-determination. However, the agent's title to territory may be restricted conditional to the fulfillment of some requirements. On the contrary, indirect theories maintain that the agent acquires territorial jurisdiction within a particular territory because control over territory is instrumental for the establishment of effective or minimally just political institutions, which in turn are necessary to the protection of fundamental interests.

I also argue that most theories struggle with three issues that make them less appealing: the need to provide a theory of original acquisition, the inability to properly address the demands of global justice, and the failure to offer an account of territorial rights that is sensitive to community specific values and narratives regarding attachment to territory.

I introduce Legitimacy-Based Conventionalism (hereafter LBC) in Chapter 5. LBC pursues a direct strategy and maintains that communities acquire jurisdictional powers regarding territory and resources because the control of a particular territory protects their members' fundamental interest in being sufficiently respected as

project pursuers. Individuals must rely on a stable system of expectations regarding their possessions and others' behavior to develop and pursue their life plans. I argue that social norms that emerge within a community have the role of ratifying these expectations of the community's members and promote peaceful and stable social relations, even when they are unjust and illiberal. However communities can only acquire exclusive rights to territory if they fulfill some minimal requirements of legitimacy.

Because only the people occupying a particular territory may hold territorial jurisdiction there, LBC has no problems determining the primary holder of territorial jurisdiction within a particular geographical location. Moreover, LBC relies on a conventionalist theory of territorial rights and it is not concerned with addressing the origin of territorial holdings, but only with evaluating whether current territorial rights reflect the social norms of the community that uphold them, and if they protect a stable system of expectations. A conventionalist theory of rights is chiefly concerned with actual and existing interests, and, in the case of LBC, with ensuring that exclusive territorial rights protect a stable and peaceful order of norms that sufficiently respects individuals as project pursuers.

Once the agent has acquired territorial jurisdiction regarding territory and resources somewhere, I argue that a community may demand exclusive titles to jurisdictional powers and resource rights only if its system of norms meets four minimal requirements of legitimacy. Moreover, the community may hold exclusive titles regarding territory only to the extent that these are necessary to the protection of a system of norms that sufficiently respect individuals as project pursuers. In distinguishing between powers and freedoms to respectively control and use a territory, and the protective immunities and claims that make these powers and freedoms exclusive to the agent that holds them, LBC is able to explain the limitations of the territorial rights established through conventions, and how these limitations protect others' relevant interest in the same territory.

In chapter 6 I introduce the legitimacy threshold and I explain why I believe that it should be minimal and negative, and that legitimacy is a composite concept. In my view, communities uphold legitimate social norms if these meet the threshold of legitimacy by sufficiently satisfying four requirements: the protection of basic goods,

the protection of freedom of expression, the protection of freedom of association, and the protection of basic economic rights. Because LBC is committed to allow communities to protect their special narrative regarding their attachment to territory as far as possible, the threshold of legitimacy can be met in different ways, as long as the community meets a satisfactory overall level of protection of its members as project pursuers. For this reason it is not important that all communities meet the four basic requirements to the same extent.

If, for example, a community is particularly good at protecting its members' freedom of association, but not very good at defending their freedom of expression, it can still meet the threshold of legitimacy, as long as the balance between the two requirements is sufficiently positive in favor of individuals' interest in self-government. Similarly, the successful protection of basic economic rights is more important if the community does not meet its members' basic needs through, for example, a system of social solidarity. The legitimacy threshold allows us to evaluate whether social norms sufficiently respect individuals as project pursuers, and it indicates to what extent communities that uphold systems of social norms may demand exclusive titles to the control and use of land and resources.

By setting demanding requirements for the acquisition of exclusive territorial entitlements, LBC is also able to respond to our intuitions about the limited claims one agent may have in a world affected by environmental and humanitarian crisis, leaving ample space for the demands of global justice. If the territorial rights that the community has established there through its conventions are not necessary for the fulfillment of the minimal requirements of legitimacy, then the community holds only powers and freedoms regarding that territory that are not protected by claims that others do not interfere or by immunities against others' powers. Unprotected freedoms and powers tell us that the agent upholding them has some relevant interests in the use and control of those territories. These interests, however, do not grant exclusive protection, and the community's titles may be permissibly limited by others' legitimate demands on the basis of subsistence, equality, self-determination, and other principles that may ground individuals' and nations' global obligations.

In the final sections of Chapter 6, I offer some examples of what these demands may look like. I suggest that the global poor might have a claim that the community

allows them to settle within their territory if they are fleeing oppressive and violent regimes. Moreover, I argue that above the threshold of legitimacy, communities' resource rights may be significantly limited by the demands of the global poor, as well as by the competing important interests of others that have legitimate territorial demands in the same territory. Depending on their nature, these interests may grant other agents a freedom to use or a power to control a territory and its resources, but not also protective claims or immunity. For example, if the community's social norms continue to be legitimate even when a wave of immigration enters its territory, immigrants may still have freedoms to enter and use the community's territory on the basis, for instance, of their interests in enjoying better employment opportunities there. In this case the immigrant's interest in entering the community's territory is not protected by a claim that the community should let him enter and the community and the immigrant have overlapping freedoms to settle within the same territory.

Possible overlapping freedoms and powers are determined by the special values and principles that the community and the individual respectively hold. LBC makes no attempt at judging the value of the two competing demands at this stage. The conflicting narratives regarding the territory at issue will have to be evaluated through a process of compromise between the community and others who hold competing and relevant interests. The compromise will pursue mutually beneficial agreements on the basis of the strength of the interests at stake. It is likely that such compromise will require the mediation of an independent third party, and, possibly, the establishment of institutions that will address disagreements of this kind. The duty to compromise is a duty of global justice, and it applies to cases where different agents demand powers or freedom to use the same territory on the basis of their special interests, such as a state's national prosperity and security, a group's self-determination, or individuals' broader ability to pursue plans and objectives. These overlapping interests may or may not conflict, and when they do, the parties ought to achieve a mutually beneficial agreement on the resolution of the dispute.

I engage with the dynamics between competing non-fundamental titles to territory in Chapter 7. There I try to show in detail the implications of LBC in cases where two or more communities uphold overlapping titles that are not fundamental to the protection of either party's minimal standards of legitimacy. To do that I examine the

issue of secession and I put forward two ideas: the first is that secession is in important ways an incident of territorial rights and not necessarily the achievement of full sovereignty. The second idea is that communities may permissibly secede, and thus take control of their territory, if they hold jurisdiction regarding the territory that they assert as their own. However, the seceding group's claim that others do not interfere with its use of the territory and its immunity against others' jurisdictional powers over the same territory are limited to the group's achievement of minimal standards of legitimacy of its social norms.

I suggest that when the parties to a secession share important but non-fundamental interests in the same territory they have towards each other a duty to compromise. The parties' titles that are defined by their conventions, but that are not protected by claims and immunities, will constitute the bundle of demands that will be evaluated in the process of compromise. At the outset of secession, it is likely that the parties will have conflicting freedoms and powers, given that they have shared the same territory and have relied on it for their fundamental interests before separation, and that their conventions have established territorial rights there. The community's reliance on a territory for objectives that are not protected by the minimal standards of legitimacy is still defended by freedoms and powers emerging from the community's values and practices within that territory. The unprotected freedoms and powers that a community's conventions establish will identify not only the parties that should participate to the compromise, but also the object matter of the compromise. At the outset of secession the duty to compromise applies to legitimate and illegitimate communities alike, and it is aimed at protecting primarily individuals' most fundamental interests by ensuring that the separation does not cause the sudden and radical worsening of people's wellbeing. Finally, Chapter 8 offers concluding remarks and possible avenues for further research.

Chapter Two - Conceptual Analysis

In this chapter, I examine the concept of territorial rights. I offer a list of incidents that make up for what we generally refer to when we speak of territorial rights. I identify territorial rights using the Hohfeldian analysis and suggest that we should speak of them as a combination of powers and freedoms with regards to the control, management, and use of a territory and its resources. These incidents are sometimes protected by a series of immunities and claims that others do not interfere with their enjoyment.

1 The Form of Rights

Wesley Hohfeld notably argues that rights are complex combinations of four basic jural relations:¹

Primary rules:

Primary rules concern physical actions and are allocated to indicate whether an action is permitted, required, or forbidden.²

- Claims: A has a claim that B *phi* if and only if B has a duty to A to *phi*

For example A has a claim that B pays him a sum of money in virtue of a contract of sale. Or A has a claim that B refrains from entering her property without permission. Claims are passive rights that regulate others' actions. They always correlate to a duty in one or more duty bearers. If everyone has a duty to A not to steal from her, for example, then A has a claim *in rem* that others do not steal her property.

¹ Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

² Wenar, Leif, "Rights", *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2015/entries/rights/>>.

- Freedoms: \mathcal{A} has a freedom to ϕ if and only if \mathcal{A} has no duty not to ϕ

Freedoms are active rights and concern their holder's actions. For example, \mathcal{A} has a freedom to fish in a river because \mathcal{A} has no duty not to do so. This also means that there is no person who has a claim that \mathcal{A} does not fish there. Moreover, freedoms do not necessarily come accompanied with protective claims.³ Thus, \mathcal{A} may have a freedom to fish in the river but lack a claim that B does not interfere with her fishing there. For example, B may have the same freedom to fish there and at the same time.

Secondary rules:

Secondary rules indicate how agents can create and modify primary rules.⁴

- Powers: \mathcal{A} has a power if and only if \mathcal{A} has the ability to alter her own or another's Hohfeldian incidents.

Like freedoms, powers are active rights that concern the holder's abilities. For example, \mathcal{A} has the power to allow B to trespass her property, thus creating upon B the freedom to cross the borders of her property and cancelling her own claim that B does not trespass. Powers can also create and modify secondary rules. So for example the Parliament has the power to issue a law that gives land owners the power to decide who enters their properties and under which conditions.

- Immunities: \mathcal{A} has an immunity if and only if B lacks the ability to alter \mathcal{A} 's Hohfeldian incidents.

Immunities are, like claims, passive titles. For example, \mathcal{A} has an immunity against the state modifying her ownership title by expropriating her property.

The Hohfeldian analysis enables us to say something about the form of rights and how they behave mechanically. The incidents are arranged in opposites and correlatives according to their logical relations.

³ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 269.

⁴ Wenar, *Rights*.

Opposites:

- A has a claim $\rightarrow A$ lacks a no-claim
- A has a freedom $\rightarrow A$ lacks a duty
- A has a power $\rightarrow A$ lacks a disability
- A has an immunity $\rightarrow A$ lacks a liability

Correlatives:

- A has a claim $\rightarrow B$ has a duty
- A has a freedom $\rightarrow B$ has a no-claim
- A has a power $\rightarrow B$ has a liability
- A has an immunity $\rightarrow B$ has a disability⁵

The analysis does not say anything about rights' nature, their scope, who holds them, or why they are accorded. However, it allows us to identify which relations between normative incidents are logical necessities and which are not. A claim necessarily correlates to a duty of others to perform or refrain from performing an action. Differently, a freedom does not correlate with a duty of others to refrain from interfering with the agent's freedom. For example, Anna may have a freedom to grow her own vegetables, but her neighbor Ben does not have a duty to provide Anna with a garden to exercise her freedom. In fact, Ben may not even have a duty not to interfere with Anna having a garden. Ben may complain to the authorities that Anna's garden attracts pests, and may request that her activity stops or that it is regulated.

Similarly, a power is always correlated with someone's liability that his or her normative incidents are subject to change. However, it is not necessarily always protected by an immunity from others' powers. Consider in fact that Italy has the power to control its borders, but does not also have an immunity against the European Union imposing rules regarding the quotas of refugees that each state member has to host. The conflict between these two powers must be regulated by

⁵ Ibid.

agreements between the two institutions. On the other hand, the United States of America hold both the power to control its borders and an immunity against the European Union powers to regulate immigration, given that the European Union does not have the power to decide the quota of refugees that the United States ought to host. Also, powers can also appear as jointly held: Anna has the power to elect her representatives in Parliament, but her power must be exercised conjunctively with the same power of her fellow members of society.

Moreover, powers that do not necessarily come accompanied with an immunity against another's power may overlap and coexist. For example, Michigan allows the farming and use of medical marijuana. However, at the federal level marijuana is classified as a Schedule I substance under the Controlled Substances Act, making its distribution a federal offence. Thus the state may not prosecute the use of marijuana in Michigan, but the federal government may. In this case Michigan has the power to allow the use for medical purposes of a controlled substance within its territory, but has no immunity against the federal government's power to make the use of marijuana a criminal act within the same territory. Like powers, freedoms may also overlap, and different people may hold freedoms that cannot be exercised at the same time, and that are not protected by a claim against interference. For example Anna and Ben both have a freedom to take a free glass of wine at a reception; however, they cannot drink the same glass of wine at the same time.

Territorial rights are complex systems of Hohfeldian normative incidents that indicate what the holder and others may legitimately do with regards to land and territory. I propose that territorial rights should be understood as a set of normative incidents combined in three broader categories:

- a) **Territorial jurisdiction:** powers to legislate, enforce, and adjudicate regarding people and regarding land and resources of individuals present within the relevant borders. These include the right to tax and regulate privately-owned property, as well as the management of non-privately-owned property. These powers may be protected by immunities against other states, sub-groups, individuals, or federal institutions exerting territorial jurisdiction within the same area.

- b) **Resource rights:** freedoms to use and powers to manage land and resources within the territory. These can be primary and secondary rules, such as the freedom to exploit a resource or the power to sell it. The freedom to use land and resources may be protected by claims that others do not use the same land and resources. Powers to manage territory may be protected by immunities against others' powers to manage the same land and its resources. These protective incidents may include claims that others do not trespass the borders of territorial holdings.
- c) **Meta-jurisdiction:** the power to transfer territorial jurisdiction to other agents.⁶

I have not listed border control as one of the categories of territorial rights because border control is a combination of territorial jurisdiction and resource rights. The agent that can control borders has either only a claim that others do not enter a territory without its permission (an incident of resource rights), or also powers to grant freedoms to enter and join the activities of the community (incidents of territorial jurisdiction). In this work, I will refer to how a theory of territorial rights may affect rights to control borders. However, I do not focus on this issue because the right to exclude others from a territory is grounded in part on the agent's territorial rights and in part on considerations regarding our global obligations.⁷ The justification of the claim against others entering a territory requires, thus, a thorough analysis of political authority and of global justice that falls outside the scope of this thesis. In this thesis, unless stated otherwise, I assume that an agent that has territorial jurisdiction and resource rights also holds rights against immigration.⁸

⁶ The incidents listed have associated immunities, according to which others lack the power to change the right-holder's normative situation.

⁷ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 201-230.

⁸ For a discussion on territorial rights and the right to control borders see Lægaard, S. "Territorial Rights, Political Association, and Immigration." *Journal of Moral Philosophy* 10, no. 5, 2013, 645-670, and Clara Sandelind, "Territorial Rights and Open Borders" in *Critical Review of International Social and Political Philosophy* 18, no. 5, 2013, 487-507.

2 Territorial Rights in Detail

2.1 *Territorial Jurisdiction*

Territorial jurisdiction comprises powers to legislate, adjudicate, and enforce general rules of conduct over people, and regarding land and resources within a territory. The entitlements that fall under this category allow the agent to set rules of conduct within a particular territory, and to create and modify secondary rules (powers and immunities) and primary rules (claims and freedoms) regarding people and regarding land and resources. A state, in fact, does not have a liberty to set rules of conduct. It has, more correctly, a power to legislate within a certain territory, and thus the power to, for example, accord to its subjects the right to acquire property and the power to sell it, or the right to express their ideas publicly. Jurisdictional powers also allow the state to appoint tribunals or special commissions and to accord them powers to legislate or adjudicate regarding land and natural resources among other issues. Territory in this case is primarily used as a criterion according to which every individual residing (permanently or temporarily) within the area of influence of the agent that holds these rights, and every resource and land within the borders of the area of influence, are subject to that agent's authority.

All rights, including territorial ones, refer to a relation between people, and not between people and objects. Objects, in fact, may not hold any normative incidents. Thus, when we speak about territorial jurisdiction regarding land and resources, such as the power to settle rules for the exploitation of an oil well, we speak of a normative relationship between the right holder and other agents regarding the use and control of the oil well. Territorial jurisdiction regarding land and resources is, thus, a type of territorial jurisdiction over people. The former concerns normative relations between people with regards to the control, management, and use of natural resources, borders, and land, but does not include also powers to legislate with regards to, for example, people's rights to freedom of expression, to associate, to access education, and the like. In this work I concentrate on territorial jurisdiction with regards to land and resources.

The reason for focusing on territorial jurisdiction regarding land and resources and not on territorial jurisdiction over people in general is that the latter pertains less to territory than it does to political authority over people in general. Territory in the case of territorial jurisdiction over people in general serves only as a way to identify the scope of the agent's jurisdictional powers. But jurisdiction over people does not necessarily need to be territorial: many institutions have authority over people regardless of their location. For example, the Roman Catholic Church can be considered a non-territorial authority, as it exerts its powers over its members regardless of whether they reside. Similarly, citizenship is a type of membership that transcends the location of the state's subjects and allows the state to control and protect its subjects in virtue of their membership in the community.

In particular territorial jurisdiction *over people in general* consists of the powers to legislate, adjudicate, and enforce rules over subjects and over aliens within a certain territory. They include, for example, the power to accord rights to the protection of one's life to people within the territory, the power to adjudicate in a case of assault occurred within the territory, or the power to give the right to vote to citizens, and to deny it to residents. Territorial jurisdiction *over people in general* may also include powers to accord or reject rights with regards to its subjects' personal property. For example, a state can accord a right of its subjects to move some of their capital abroad, or reject aliens' entry if they are transporting goods that the state deems as a threat to its community.

Powers over aliens within the territory may include the power to accord (or reject) citizenship or residency to individuals who enter the territory. Powers over aliens within the territory differ from the claim that aliens do not enter the territory because in the former case the state is according aliens with a right to stay or a duty to leave. In virtue of its territorial jurisdiction, the state can exercise its power to coerce aliens to comply with their duty to leave the territory if they are already present. Instead, the claim that they do not enter a territory without the state's permission is an incident of resource rights, which concern the physical actions permitted or not with regards to the state's territory. When aliens are outside the territory, in fact, the state has no power over aliens on the basis of its territorial jurisdiction, and it can only claim that they do not enter its territory if it holds such claim.

Territorial jurisdiction *over people regarding land and resources* consists instead of the power to legislate, adjudicate, and enforce rules regarding agents' use of land and natural resources located within the territory. These powers include those to regulate privately or publicly owned property, such as the power to determine rules of taxation regarding the use and management of property holdings or to establish conditions under which private owners can exploit a deposit of oil that belongs to the country. Territorial jurisdiction over land and resources also includes powers to regulate the discovery and appropriation of undiscovered resources. The state can, for example, establish the rules for original acquisition by setting a rule according to which every newly discovered resource deposit belongs to the state.

Territorial jurisdiction over people in general includes jurisdictional powers regarding territory, but may occur independently and separately from incidents of territorial jurisdiction regarding territory. For example, the Republic of San Marino holds territorial jurisdiction over people having the power to accord residency or to tax capital investments made within its soil; however, it lacks the power to regulate the cultivation of tobacco, which is instead held by the Italian Republic. The Republic of San Marino is an example also of an agent that holds some territorial jurisdiction regarding territory, but it lacks some powers of territorial jurisdiction over people in general. San Marino has powers to tax property held within its borders, which is an incident of territorial jurisdiction regarding territory, but its powers to legislate and adjudicate regarding criminal activities within its borders is deferred to the Italian Republic. Moreover, territorial jurisdiction may be held together or separately from protective claims or immunities. San Marino, for example, has no immunity against Italy imposing criminal laws within its territory. And although it has a power to accord residency to aliens, it has no claim that Italians do not enter its territory.

Territorial jurisdiction over people is largely part of a theory of political authority in general. It takes into consideration values and principles that do not have to do only, or exclusively, with territory and resources. So for example, a theory of political authority will be concerned with the conditions under which an agent may restrict and regulate its subjects' freedom of expression or their right to associate or to vote. Territorial jurisdiction with regards to territory and resources, on the other hand, is concerned with the circumstances under which someone can buy property in land, or

exploit natural resources found within particular territorial borders. Although I focus on territorial jurisdiction with regards to territory, in the following chapters I will also discuss how a theory of territorial rights may affect our normative theory of territorial jurisdiction over people in general. However, a serious attempt at examining territorial jurisdiction over people in general requires an encompassing theory of political authority that I do not offer in this work.

Finally, I argue that in so far as territorial jurisdiction regarding resources spills over the domain of political authority over people in general, its exclusive exercise must be subject to some requirements of legitimacy. I define these requirements in Chapter 5. However, the picture that I paint there can only be incomplete, as it requires a fuller understanding of people's national and global reciprocal obligations and a view on the conditions under which political authority can ever be exerted.

2.2 *Resource Rights*

Resource rights are entitlements to access, manage, and use natural resources and land. Resource rights comprise primary and secondary rules. Primary rules, such as the liberty to use a deposit of oil, indicate whether an action is permitted, required, or forbidden with regards to land and resources within a particular territory. Secondary rules, like the power to sell a piece of land, indicate the ability of the agent to change his or another's normative incidents with regards to that particular land.

Resource rights may include, but are not limited to:

- *The right to possess a land or its resources and to exert physical control over it:* for example, a claim that others do not enter the territory;
- *The right to use the land or its resources:* for example, the freedom to exploit the oil deposit of a specific geographical area;
- *The right to manage the land and its resources:* for example, the power to decide how and by whom the land and its resources can be used, or under what conditions others can trespass;

- *The right to the income from land and its resources*: for example, the claim to the proceeds from land;
- *The right to the capital value of a land and its resources*: for example, the liberty to exhaust a deposit of oil;
- *The immunity from expropriation*;
- *The right to transmit the title to others, by sale or gift*: for example the power to sell or donate a deposit of oil.⁹

Resource rights may appear together with claims that others do not interfere with the exercise of some freedoms, or with immunities against other's powers to manage the same land. For example, an Amish congregation may have a right to manage the water of a river by, for example, deciding who can use it for fishing, and how much water each family may draw from it every week. This power may be protected by an immunity against the neighbouring Amish community to control the fishing activities there. But it is possible that the two Amish communities share the power to manage the same river, and must take decisions jointly regarding fishing activities there.

Supporters of the view that territorial rights are ultimately property rights call attention to the fact that owners may hold jurisdictional powers regarding resources and land. They argue that the owner has a power to regulate how people should behave within the borders of their property, like for example imposing on guests a dress code for a house party if they want to enter the property. Because property rights allow the owner to accord rights and duties to people on the basis of their location, they argue that property rights can include not only resource rights, but also powers of territorial jurisdiction.¹⁰

However, territorial jurisdiction indicates powers to create and modify resource rights, and the two classes of territorial rights must be distinguished to clarify their

⁹ Resource rights are akin to property rights and for this list I have taken inspiration from Honoré's list of incidents that comprise ownership (A.M. Honoré, "Ownership" in *Oxford Essays in Jurisprudence*, ed. A.G. Guest (Oxford: Oxford University Press, 1961), 18; Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988), 49.

¹⁰ A.J. Simmons, "On the Territorial Rights of States" *Philosophical Issues*, 11, no. 1(2001): 307; Hillel Steiner, "Territorial Justice and Global Redistribution" in *The Political Philosophy of Cosmopolitanism*, eds. Gillian Brock and Harry Brighouse (Cambridge: Cambridge University Press, 2005), 34.

relation. Blending the two categories of rights obscures the difference of the roles that they perform, and it muddles the debate on their moral foundations. Moreover, territorial jurisdiction and resource rights are independent from each other and do not necessarily appear side by side. In fact, an agent may hold territorial jurisdiction within a territory without also holding resource rights there. Consider again San Marino. It has territorial jurisdiction but does not have a claim that aliens, and in particular Italians, do not enter its territory without permission. An agent may also hold resource rights without having territorial jurisdiction. For example, a group may have the right to use a river for fishing and the claim that others do not use the same river without its permission. However, the group may also lack the power to legislate with regards to the limitations of fishing activities, which may be deferred to political institutions aimed at protecting the environment.

2.3 *Meta-Jurisdictional Rights*

Meta-jurisdictional rights are higher order secondary norms that allow the agent to create and modify jurisdictional powers over people and territory. Meta-jurisdictional rights that are territorial allow their holder to accord territorial jurisdictional powers to others over an identified territory and to create and modify territorial jurisdictional units.¹¹ The clearest example of meta-jurisdictional powers is the right to secede. When a group secedes from an existing state, it exercises powers to accord territorial jurisdictional powers to new political institutions. Moreover, the group also exercises the power to identify the territorial borders of the new political unit. Thus, we can distinguish two incidents of territorial meta-jurisdictional powers:

- powers to determine *who* holds jurisdictional powers within a territory:

An example is the power of the United States of America to accord to the US federal institutions some powers of territorial jurisdiction over their soil. These powers differ

¹¹ Allen Buchanan, “The Making and Unmaking of Boundaries: What Liberalism Has to Say,” in *States, Nations, and Borders: The Ethics of Making Boundaries*, eds. Allen Buchanan and Margaret Moore (Cambridge: Cambridge University Press, 2003), 235; Anna Stilz, “Why do States Have Territorial Rights?” *International Theory*, 1, no. 2 (2009): 206.

from non-territorial meta-jurisdictional powers as they allow the holder to accord territorial jurisdiction with regards to land and resources. A non-territorial meta-jurisdictional power, differently, allows the agent to accord jurisdictional powers that do not regard land and resources. For example, a non-territorial meta-jurisdictional power can be the power of the United States of America to accord to the US federal institutions powers to protect their citizens abroad through the activities of embassies and consulates.

- powers to determine *which territory* is controlled by agents that is entrusted with jurisdictional powers:

These powers allow the agent to identify the geographical extent of the validity of territorial jurisdiction. Territorial meta-jurisdictional rights include powers to control and limit dismemberment of the territorial unit, or to identify in the first place the extent of the territorial unit under an agent's territorial jurisdiction. For example, Russia exerted its territorial meta-jurisdictional power by transferring to the United States in the late 19th century jurisdictional powers over Alaska.

3 Conclusion

In the following chapters, I provide an analysis of the existing theories of territorial rights. I organize them according to the way they justify territorial jurisdiction and the way they identify the agent that can hold territorial rights. I use the terminology set up above to refer to each different incident, and I use the term *territorial rights* to indicate all the incidents in general. To a large extent, my terminology does not differ radically to that used by the literature. However, the literature does not distinguish between territorial jurisdiction and resource rights and the immunities and claims that protect these two classes of entitlements. For the most part, when other authors speak of territorial jurisdiction or resource rights they imply that they come accompanied with claims and immunities that make these rights exclusive to the right holder. For this reason, only in Chapter 3 and 4 do I use the terms 'resource rights' and 'territorial jurisdiction' to include also the corresponding claims of non-interference and immunities against overlapping jurisdictional powers. However, in

Chapters 5, 6, and 7, I will refer to resource rights and territorial jurisdiction as distinct from the possible protective claims and immunities that may accompany them.

The inclination of the literature to speak of territorial jurisdiction and resource rights as exclusive reveals the intuition that for a right to be meaningful it must appear in its strongest form, as an exclusive title to something. If we can identify very strong entitlements to something, then our work in addressing conflict will, indeed, be much easier. However, rights play the role of strong moral considerations in favor of the right holder even if they are not protected by claims and immunities. Competing and overlapping freedoms and powers, even when left unprotected, tell us something about whose interests are worthy of protection and whose are not, and to what extent the protection of these interests must drive our decisions. Moreover, it is not always the case that coexisting and overlapping freedoms and powers will necessarily be in conflict.

In Chapters 5, 6, and 7, I develop my proposal and explain why we do not need to speak of territorial jurisdiction and resource rights as necessarily exclusive. I rely on the distinction between powers, freedoms, claims, and immunities to show that a more nuanced account of territorial rights allows us to address territorial conflicts without neglecting the various and complex ways in which individuals and groups relate to territory and resources, and to each other.

Chapter Three - Indirect Theories

1 Introduction

In this chapter I examine the literature on territorial rights and divide it accordingly to two justificatory strategies: indirect and direct. Direct theories maintain that an agent acquires territorial jurisdiction because the agent's control over that territory is in itself necessary to the protection of some fundamental interests, such as collective self-determination, individuals' ability to pursue one's life-plans, or individuals' happiness. Indirect theories, on the other hand, maintain that an agent acquires territorial jurisdiction because jurisdictional powers regarding territory and resources are instrumental for the establishment of effective or minimally just political institutions, which in turn are in themselves necessary to the protection of fundamental interests.

Armstrong makes a similar distinction between direct and indirect claims to resources. Similarly he suggests that a direct claim to a resource states that an agent has a right to control and use a resource on the basis of "some feature of the agent's relationship with that resource." An indirect claim, on the other hand, is grounded on "prior claims such as claims to exercise control over land or over borders."¹ Armstrong distinction differs from mine in so far as it refers to resource rights. For Armstrong indirect accounts of resource rights justify resource rights on the basis of existing titles to territorial jurisdiction. My distinction applies the same framework to territorial jurisdiction, and classifies theories on whether they propose that an agent's powers of territorial jurisdiction are grounded on a prior entitlement to legitimate authority over its members, or whether they are justified because they are in themselves instrumental to the protection of fundamental interests.

In particular, for indirect theories, jurisdictional powers on territory must be accorded to a political community that has established or is able to establish just institution within a bounded area, in so far as control over that area is needed for the

¹ Chris Armstrong, "Against 'permanent sovereignty' over natural resources," *Politics, Philosophy & Economics* 1, no. 23 (2014): 132.

effective performance of the groups' political institutions. If a state or a group is able to establish or has established justice within a territory, then it acquires territorial rights on that territory, including jurisdictional powers, resource rights, border control, a claim that others do not use their resources, and an immunity against others' jurisdictional power within their land. For direct theories, on the other hand, communities or individuals acquire territorial rights if these are in themselves necessary for the protection of the agent's interests, and regardless of whether the agent upholds legitimate authority. In this and the next chapter, I show that direct theories are preferable because they do not incur in what I call the *in rem* problem, and because they are better at addressing the particularity requirement.

The *in rem* problem occurs when a theory does not succeed in offering a conclusive justification in favor of one agent's territorial jurisdiction and against other agents' competing jurisdictional powers. Because they suffer from the *in rem* problem, indirect theories must resort to some principle other than legitimate political authority to establish some agents' interests priority over others'. Buchanan suggests that in some cases, like for instance secession, we must hold a precautionary principle against the unnecessary alteration of current territorial holdings, thus proposing that the existing group upholding just institutions is the primary holder of territorial rights.²

However, a precautionary principle of this kind does not tell us why or how the group can legitimately take control of a territory and establish political institutions there. This strategy thus fails to address the particularity requirement, which demands that the theory is able to explain why an agent can take control of a particular geographical location and its resources. It would seem that the only reason why the agent that currently exerts territorial jurisdiction can continue to do so is that it has in the past successfully excluded others from establishing political institutions there. It is possible, in fact, that the establishment of functioning institutions is not instantaneous, and that to establish those institutions the agent must have physically taken control of the territory before it could legitimately do so. A theory that is able to address the *in rem* problem and the particularity requirement, on the other hand,

² Allen Buchanan, "Theories of Secession," *Philosophy and Public Affairs* 26, no. 1 (1997): 47; Buchanan, *The Making and Unmaking of Boundaries*, 288.

will offer an account of why and in what conditions an agent may legitimately establish institutions within some particular geographical borders, before it actually exercises *de facto* control of that territory.

The indirect theories are subject to the *in rem* problem in two ways. First, some indirect theories require that an agent has established minimally just institutions that protect fundamental human rights within some geographical borders for it to hold legitimate authority over its members. If this is true, other agents that may have legitimate demands on the use and control of territory may see their interests unnecessarily frustrated. Think for example of states that are members of federations or confederations, but also of administrative authorities and large metropolises that in some cases exert similar powers to those of a state and effectively provide for the protection of their members' fundamental rights. If two or more agents effectively protect fundamental human rights within an area, then it is unclear which agent should be given priority.

Second, the *in rem* problem is particularly acute for those indirect theories that suggest that for an agent to establish territorial jurisdiction, it has to demonstrate that it is able to establish justice within a territory. In those cases, it is very likely that one or more agents may display the same ability. As I will show in this chapter, these types of indirect theories often resort to some account of attachment that ensures that those who legitimately occupy a territory acquire rights on the territory within which they have led their lives. However, for these theories attachment merely establishes that some individuals or groups have exclusive rights to use and occupy certain territories and does not provide the ground for territorial jurisdiction, as the latter must be acquired through the legitimate exercise of political authority.

Because direct theories maintain that an agent acquires territorial jurisdiction when it has fundamental interests in a territory, they are more successful in determining a unique right-holder. For these theories, attachment to a land provides the basis of an agent's title to that territory. In this way they settle unequivocally that the agent's jurisdiction over the territory that it occupies overcomes other agents' competing powers, when they do not also occupy and make use of the territory in any significant way.

Direct theories are also better suited to fulfill the particularity requirement. The particularity requirement, as introduced by Anna Stilz demands that a theory of territorial rights explains not only how an agent can come to acquire a title to territory in general, but also why it has a right to use and control the particular territory that it asserts as its own.³ Theories that merely explain why an agent has a title to a territory in general do not necessarily address the issue of which particular territory is legitimately under the control of the agent.

Direct theories rely on an account of attachment to territory to explain how an agent may have interests worthy of protection, on the basis of which the agent is accorded territorial jurisdiction. For these theories, an agent can acquire territorial rights only on the territory within which it has established a significant relation that realizes fundamental values. Some theories suggest that the fundamental interest that territorial rights protect is individuals' self-government, or their happiness, or collective self-determination. There is only one type of direct theory that fails to address the particularity requirement: the utilitarian theory proposed by Sidgwick. I will suggest that this is so because Sidgwick, like supporters of indirect theories, employs a functionality principle to ground territorial rights.

Depending on what type of agent can hold territorial rights, theories may perform significantly differently with regards to some of the requirements of a theory of territorial rights. For this reason I examine each direct and indirect theory according to whether the theory maintains that only states may have territorial rights (statist theories), or groups (collectivist), or also individuals (individualist).

I argue that statist theories are subject to the charge of ethnocentrism. Ethnocentrism is "the risk, attendant on any achievement view, of smuggling in a culturally particular performance criterion,"⁴ such as the protection of a certain conception of property or of efficient use of territory. Statist views are achievement views in the sense proposed by Kolers: for these theories an agent acquires territorial jurisdiction in virtue of some type of performance that the agent must give, such as for example functioning as a state, or achieving some particular goals under certain

³ Stilz, *Why do States Have Territorial Rights?* 187.

⁴ Avery Kolers, "Attachment to Territory: Status or Achievement?" *Canadian Journal of Philosophy* 42, no. 2 (2012): 103.

institutional settings. This approach leaves little space for different communities to express their system of values and their narratives regarding territory. In fact, it sets specific ways in which important values must be realized and imposes a limitation also on which values and relations with the land should be achieved and protected. The alternative view, the “status view,” holds instead that an agent acquires territorial rights in virtue of some characteristic that it holds. For example a group acquires territorial rights because membership in that group is at the center of its members’ identity or because it is a voluntary association of individuals.

Undeniably, any normative proposal regarding the acquisition and enjoyment of rights will limit the set of acceptable agents that are able to hold titles on territory. Armstrong speaks in this regard of achieving a balance between “special claims” and “general claims.” The former are special because they are asserted only by some communities, and because these communities demand control of specific resources that are in some sense important only to those who regard them as such. “General claims,” on the other hand, are demands that outsiders to the relevant communities make on their resources, on the basis of deprivation, lack of opportunities for prosperity, or equality.⁵

A theory that aims at reducing conflict and resentment among diverse individuals and groups, and at boosting the success of peaceful international and global relations, ought to strike a balance between universal normative requirements and the plurality of values that different agents may find worthy of protection. Imposing strict demands on what a group of people must believe regarding the value and importance of their relation to territory increases resentment towards cultural and political integration. I say more about this in Chapter 6, where I introduce my proposal for minimal and negative requirements of legitimacy.

Collectivist theories, on the other hand, are generally very good at addressing the issue of ethnocentrism, maintaining that territorial rights should be identified through community specific interpretations of the idea of territory and resources. However, as Armstrong has suggested, this strategy risks leaving little space for

⁵ Chris Armstrong, “Resources, Rights and Global Justice: A Response to Kolers,” *Political Studies* 62 (2014): 216.

considerations regarding the demands of global distributive justice, whether the theory employs a direct or indirect approach. In most collectivist theories, special demands based on community-specific systems of values are given a central role in determining the scope and extent of territorial rights. This often results in the theory neglecting universally valid global justice demands, and failing to strike a balance between specific and general demands.⁶

Finally, individualist theories are generally very good at addressing the particularity requirement and the *in rem* problem, given that the title to a territory is grounded on the property rights of a specific set of individuals and on the basis of a direct relation between them and the land that they occupy. They also have an advantage with regards to the global justice problem: in fact, individualist theories argue that individuals may acquire territorial rights regardless of their membership, and on the basis of fundamental interests that they may have in the use of territory and its resources, regardless of where they reside. For example, the left libertarian theory proposed by Steiner suggests that each individual has a general right to a share of resources, and a special – albeit limited – right to the resources to which he or she has access. However, individualist theories generally require an account of original acquisition and valid transfer, as they ground territorial rights on a theory of individual property rights. Because of their reliance on a prior theory of property rights, these theories encounter the challenge of offering a convincing story about original acquisition and valid historical transfer. In Chapter 5, I show that this problem can be avoided by employing a conventionalist theory of territorial rights.

As I will suggest in Chapter 7, individualist theories also have problematic implications regarding secession, maintaining that individuals may be permitted to secede separately from each other. The individualist view is in sharp contrast with the way we commonly think of territorial holdings, and a theory holding such a view must go a long way to convince us otherwise. It is not the case that a theory must necessarily meet with our current intuitions regarding territory, nor with the current international practices or legislation. However, a successful theory of territorial rights must be able to convincingly balance our common intuitions and practices to avoid

⁶ Ibid., 217.

being overly utopic or unfeasible. Although individualist theories may have a theoretical advantage with regards to some of the problems encountered by the literature, I believe they do not strike that balance, and they put forward an improbable and unworkable view of territorial rights.

The correspondence between ethnocentrism and statist theories, between collectivist proposals and the failure to address the demands of global justice, and between individualist theories and the need to offer a convincing story about original acquisition is not a logical necessity. However, these relations are one factor that weights in the balance when evaluating the suitability of a theory of territorial rights.

The table at 1.1 provides a summary of the analysis of the literature and of the challenges that it faces.

In the next sections I discuss what I call indirect theories of territorial rights. Indirect theories are subject to the *in rem* problem and the particularity problem with few exceptions. The permissive theory proposed by Ypi is not subject to the *in rem* problem as it holds that only the state that is effectively exerting political authority and effectively upholding cosmopolitan institutions within a territory holds rights to that particular territory. As I will discuss below, although Ypi's proposal resolves the issue of identifying a unique right-holder of territorial rights, the theory is unable to address the particularity requirement and the demands of global distributive justice. For Ypi, in fact, effectively functioning states acquire robust territorial rights as long as they meet some minimal requirements that do not also include the respect for the demands of a theory of global justice.

Stilz's occupancy theory and the Nine's collectivist Lockean theory are both able to address the particularity requirement by holding that a group of people can acquire territorial jurisdiction within a particular land only if they also have previous occupancy rights (or resource rights) within that land on the basis of a fundamental relation between them and the territory they occupy. However, because these prior rights are not territorial jurisdictional powers, the theories do not successfully isolate one unique holder of the power to exert jurisdiction within specific geographical boundaries. I suggest that the collectivist Lockean theory also encounters the difficulty of having to offer a convincing account of original acquisition and just

transfer, and – for one version of the theory – it also has trouble striking a balance between special and universal demands to territory.

1.1 Table: Analysis of the Literature

			In Rem	Particularity	Original Acquisition	Global Justice	Ethnocentrism
			It does not offer a conclusive justification in favor of the group's territorial jurisdiction and against existing competing jurisdictional powers.	It is unclear which exact territory is the object of territorial rights and why it cannot be any other.	It requires a convincing account of original titles to land and of just transferal.	It leaves no space for considerations regarding global distributive justice, giving too much discretion to right holders in defining the extension of their holdings.	It frustrates community specific values and narratives regarding the use and preservation of a certain territory.
Indirect	Statist	Legitimate State (Buchanan)	√	√	<i>Few indirect have this problem because property rights are established with the establishment of political institutions.</i>		√
		Occupancy (Stilz)	√				√
		Permissive (Ypi)		√		√	√
	Collectivist	Collectivist Lockean (Nine)	√		√	√	√
		Freedom of Association (Wellman)	√	√		√	
Direct	Statist	Utilitarian (Sidgwick)	<i>Direct theories always succeed because territorial jurisdiction is acquired on the basis of the agent's special and unique relation with the territory.</i>	√	<i>Statist theories often do not encounter this problem because the state is the precondition for the establishment of property rights.</i>	√	√
	Collectivist	Liberal Nationalism (Miller)		<i>Few direct have this problem, because title is closely tied to a particular territory.</i>	√	√	√
		Self-Determination (Moore)			√	√	<i>Collectivistic theories often succeed because they consider of pivotal importance the community specific system of values to allocate territorial rights.</i>
		Plenitude (Kolers)				√	
	Individualist	Individualistic Lockean (Simmons)			√	<i>Individualist theories always succeed because they posit that individuals acquire territorial rights and other rights no matter their membership.</i>	√
		Left Libertarian (Steiner)			√		√

2 Statist Indirect Theories

Statist indirect theories maintain that only states can legitimately demand territorial rights on the basis of their power to exert political authority over people. Because political authority is necessary for the protection of individuals' basic human rights, a political community that has established or can establish functional and minimally just political institutions acquires control of a territory. Once a state has established or can establish legitimate powers over people, and thus also legitimate territorial jurisdiction, it subsequently acquires robust rights to resources and claims against interference, the right to control borders, and immunities against others' overlapping territorial jurisdiction.

In this chapter, I refer to the combination of these four normative incidents as territorial rights in general and to each separate incident if the argument distinguishes between territorial jurisdiction, border control, and rights to the use and exploitation of resources. The theories I examine in this chapter make no distinction between territorial jurisdiction and the immunity against others' powers on the same territory. In the following chapters, it will be clear that my account relies heavily on the fact that these two incidents are distinct and can appear disjunctively.

However, for now I follow the classic terminology. Thus, when I speak of territorial jurisdiction I imply that it includes also immunities against others' jurisdictional powers on the same territory. So for example, if we believe that the United Kingdom has territorial jurisdiction over its soil, we also assume that the European Union has no power to impose on its government that it accepts and integrates a quota of Syrian refugees, unless the United Kingdom has previously devolved to the European institutions such power.

Statist indirect theories differ from each other with regards to the requirements for legitimate political authority, and the way in which they identify the scope of the territorial holding. The legitimate state theory proposed by Buchanan, and the occupancy theory by Stilz employ a functionality principle, which holds that a state acquires territorial jurisdiction if this power is necessary to secure minimal standards of performance. For Buchanan, a state secures minimal standards of performance if

it establishes functional minimally just political institutions within a territory, and for Stilz it acquires territorial jurisdiction if it is able to establish minimally just institutions.

Ypi's permissive theory, on the other hand, uses the permissive principle according to which a state acquires territorial jurisdiction if this power is necessary for the establishment of cosmopolitan justice. Given that cosmopolitan institutions are difficult to fully realize, a state holds territorial jurisdiction only provisionally when it has established functional institutions that represent the general will of the people subject to them, and when is at least committed to the realization of cosmopolitan institutions. Territorial rights become conclusive if the state subjects itself to existing and just cosmopolitan institutions. The permissive principle is a type of functionality principle, holding that state institutions are needed for the realization of both internal justice and cosmopolitan principles. The functionality and permissive principles require that the agent give a certain institutional performance to be able to hold territorial jurisdiction. In this way the three theories restrict significantly the possibility that alternative values and practices from those realized by a theory of just state may be the ground for legitimate jurisdictional powers over territory, making the statist indirect theories subject to the challenge of ethnocentrism.

In the next subsections, I examine the details of the three variants of indirect statist theory to show that they suffer from the *in rem* problem, that they do not successfully address the particularity requirement, and that their focus on states as the only agents able to hold territorial rights makes them liable to the charge of ethnocentrism.

2.1 *Legitimate State Theory*

The legitimate state theory maintains that states hold territorial jurisdiction as long as they establish minimal conditions of justice through state-like political institutions. The establishment of just institutions that effectively protect at least individuals' basic human rights grounds the state's territorial jurisdiction, as well as the state's powers

of political authority over people within the territory that its subjects occupy.⁷ Institutions that are able to protect fundamental individual interests, Buchanan and Stilz argue, can only be a state-like actor that is able to establish the rule of law, and to ensure the protection of rights.⁸

Stilz refers to the Kantian version of the problem of the unilateral will to explain why individuals cannot establish property rights in land without the prior establishment of state-like political institutions.⁹ According to the Kantian theory of right, individuals can take legitimate possession of some external object only if they are effectively subject to the general will, embodied in established political institutions. When an agent takes possession of some external objects, such as land, he can exert exclusive control over it only by means of imposing on others a duty to refrain from using the object of his choice. This imposition, however, cannot source merely from the agent's desire to have that land for him. If the obligation of others was grounded on the simple unilateral imposition of the agent's will, then the relation between the agent and other agents would be subject to the volatility of individuals' or groups' desires and ability to coerce each other into compliance.

To avoid the unilateralness of acquisition, every agent should collect each other's consent to act freely in the external world. This, however, is impossible, and agents are thus effectively hindered from exercising their natural right to freedom. It seems that an agent would be forced by necessity (to feed himself or to find shelter, for example) to violate other agents' rights unilaterally, and thus to act unjustly. Kant suggests a way out of this problem by proposing that individuals' unilateral will can be imposed with the condition that they subject themselves to the authority of the general will, and thus, to established and shared political institutions. The function of the state is that of establishing rights (and thus also property rights in land) among its citizens in virtue of the fact that free individuals have an interest in exercising their

⁷ Buchanan, *The Making and Unmaking of Boundaries*, 233; Allen Buchanan, *Justice, Legitimacy, and Self-determination* (Oxford: Oxford University Press, 2004), 234; Christopher H. Wellman, *A Theory of Secession: The Case for Political Self-Determination* (Cambridge: Cambridge University Press, 2005), 64; Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012), 36; Stilz, *Why do States Have Territorial Rights?*, 204.

⁸ Buchanan, *Justice, Legitimacy, and Self-determination*, 374; Stilz, *Why do States Have Territorial Rights?* 199.

⁹ Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2003), 173; Anna Stilz, "Nations, States, and Territory," *Ethics*, 121, no. 3 (2011): 581; Lea Ypi, "A Permissive Theory of Territorial Rights," *European Journal of Philosophy*, 22, no. 2 (2012): 303.

external freedom, without being subject to the unilateral will of others. Only by means of establishing state-like institutions, then, can individuals and groups acquire legitimate titles to external objects. States' rights, for this reason, are prior to individual rights.

Similarly, Buchanan suggests that states can hold territorial rights if they effectively protect basic human rights through processes that themselves protect human rights.¹⁰ The validity of territorial rights rests, thus, on the effective protection of human rights through legitimate political institutions. Moreover, individuals are under a natural duty to submit to just political association, to support just institutions that already apply to them, and to help ensure that everyone has access to minimally just political institutions.¹¹ According to this view, treating persons as moral equals require that we help them access minimally just institutions, because just political and legal institutions are necessary for the protection of human rights.¹² Although Buchanan makes no explicit reference to the Kantian problem of the unilateral will, the insistence on a natural duty of justice resonates with the Kantian argument of the necessity of legal and political institutions.

States, thus, hold political authority in virtue of the interest of individuals in being subject to just institutions that effectively ensure the protection of a system of rights. For the system of rights to credibly represent the general will, the state is required to put in place mechanisms to ensure that every subject's interests are met. These mechanisms must be reactive to the people's beliefs and needs, and they must enact rules that its subjects would reasonably endorse. For this reason the political institutions that a state should have to hold territorial rights must pursue the values of political participation and freedom of expression, and they must ensure the respect of basic rights to life, security, and individual liberty.¹³

States acquire robust territorial rights because these are functional to the securing of the required minimal standards of performance. It is important to note that the functionality principle is valid only to the extent that the institutions respect basic

¹⁰ Buchanan, *Justice, Legitimacy, and Self-Determination*, 247.

¹¹ *Ibid.*, 27 and 87.

¹² *Ibid.*, 88.

¹³ Stilz, *Nations, States, and Territory*, 23; Buchanan, *The Making and Unmaking of Boundaries*, 245.

human rights and comply with democratic principles of political participation and individual freedom. This allows the legitimate state theory to limit the acquisition of robust territorial rights only to those states that respect some universal set of human rights. The proponents of the legitimate state theory do not expressly mention how their theory strikes a balance with the demands of global distributive justice. However, the limitation on the acquisition of resources leaves ample space for the demands of global distributive justice, especially if the functionality principle is intended to limit territorial acquisition to only what is necessary for the protection of minimal conditions of justice.¹⁴

The legitimate state theory does not offer an explanation as to why states have rights on the particular territories they control. That a state is able to establish justice somewhere says nothing about the state's entitlement to the particular territory that it occupies. As Stilz notes, it is not sufficient to show that the state has a right to territorial jurisdiction to explain why the state has a right to exert territorial jurisdiction within a particular territory.¹⁵ So for example, that the state of France has a right to territorial jurisdiction because territorial jurisdiction is necessary for the proper functioning of its institutions does not explain why France has territorial jurisdiction only over the territory of France and why its institutions could not be legitimately imposed or established somewhere else.

To show that for instance the state of France has no right to Antarctica or that it has indeed a right to territorial jurisdiction within the territory its members currently occupy, a theory of territorial rights must show why the state of France has a normatively important relation with the particular territory it controls. The justification of the right to a particular territory should also tell us why no other agent has territorial jurisdiction on the territory controlled by the state of France.

For Buchanan, the presence of a community in a particular territory is an arbitrary fact. This does not establish any normative tie between the group and the land. Thus, it is unclear why a group of people may not be able to carry out their natural duty of justice in any territory that is not already legitimately controlled by another group,

¹⁴ Armstrong, *Against Permanent Sovereignty*, 11.

¹⁵ Stilz, *Nations, States, and Territory*, 187.

even if they do not occupy that territory to begin with. The legitimate state theory does not offer arguments against benevolent colonialism or the annexation of territories that are not controlled by minimally just state-like institutions but that may very well be occupied by other types of political communities.¹⁶

Moreover, the theory is not able to identify a unique holder of territorial jurisdiction and thus suffers from the *in rem* problem. If a state acquires territorial holdings because it effectively protects basic rights somewhere, it is unclear which state may demand exclusive territorial jurisdiction in the case of federations, confederations, or associations like the European Union. In these cases both the higher order institutions and the states members may uphold state-like institutions that are able to protect individuals' basic human rights. The legitimacy state theory does not offer a principle that gives priority to one or the other agent in the case of overlapping functioning institutions. One could say that the relations between states and federal institutions, for example, are determined by the agreement of the member states, that will decide to what extent federal institutions may legitimately exert territorial jurisdiction within their territory.

However, the theory does not help us understand why states had territorial jurisdiction to begin with and why their titles to jurisdiction take priority over other associations that may have emerged later in time. It would seem that the only reason why the states members of a federation enjoy territorial jurisdiction because they have successfully established political institutions somewhere at some point, obstructing others from doing the same. In fact it is probable that the establishment of the state's functioning institutions was a process that involved physical control of the territory before the state could legitimately exert jurisdiction there. To justify the priority of the state that first established just institutions one must invoke the natural duty of justice and argue that subjects of a state have a duty to support just political institutions regardless of how they came to be established. This is Buchanan's position that also entails that a group may never secede from a minimally just state.

¹⁶ Buchanan doesn't offer any specific argument that justifies the particular rights to the territory that a state holds. His account implies that the location in which some states emerge and develop is a matter of chance. Although he doesn't explicitly develop this argument further, it could be reasonable to think that he appeals to some inherent value in actual occupation of land as a precondition for holding territorial entitlements.

On the other hand, Stilz argues that some groups may secede even if they are already subject to just institutions. In the next section and in Chapter 7 I explain why this concession leads to problematic implications and makes the occupancy theory liable to the *in rem* problem.

2.2 *Occupancy Theory*

The occupancy theory builds on the legitimate state theory, and uses a combination of the occupancy principle and the individual self-government principle to address the particularity requirement. For the occupancy theory, a state has territorial jurisdiction because this power is necessary for the state to secure minimal standards of performance (the functionality principle) and if it represents the people that are legitimately occupying that particular territory.

For the occupancy theory a state has territorial rights if the requirements for legitimate political authority are satisfied.¹⁷ However, the state must also meet two other conditions: (1) the subjects of the state must have a legitimate right to occupy that specific territory, and (2) the state must not be a usurper. Condition (1) directly addresses the particularity problem and introduces the idea of occupancy rights. Condition (2) poses a further constraint on the legitimacy of state's political authority that requires that the state to which a people is subject has in some ways authorized it. I will address condition (2) later in this section and suggest that the introduction of this condition makes the occupancy theory liable to the *in rem* problem. For now, I will examine the occupancy theory's response to the particularity requirement and introduce two principles that make this theory an interesting and compelling proposal: the occupancy principle and the individual self-government principle.

¹⁷ Stilz divides this requirement into two: (1) the state is able to implement a minimally efficient system of law, and (2) the system of laws protects basic rights and provides for political participation. This second requirement is satisfied if the agent is a state and if the rule of law respects the principles of democratic participation. Stilz's argument for democracy supports the primacy of the state as the only agent that can establish democratic institutions. The fact that the state is the only agent worthy of holding territorial rights is thus not a condition for territorial rights to be legitimate but a logical necessity for individuals to emerge from the state of nature: Stilz calls it a "natural duty to uphold just institutions" (*Nations, States, and Territory*, 38). Stilz's theory is grounded on the same premises of the Kantian theory of inner freedom and the problem of the unilateral will explained in section 2.1.

To fulfill condition (1), the subjects of a state must legitimately occupy that particular territory. Individuals have occupancy rights on a particular geographical location if they currently reside there or have previously done so (the *occupancy principle*), if access to that particular area is fundamental to the pursuit of their located life plans (the *principle of individual self-government*), and if the individuals' relation with that area was established without wrongdoing on their part.¹⁸ In this view, the people legitimately occupying a territory have a *prima facie* claim that others do not displace them from that location and do not disrupt their life plans.¹⁹

The principle of occupancy together with the principle of individual self-government recall a widespread intuition that the mere fact of occupation should have moral significance,²⁰ in particular in relation to the expectations that it creates within a community, and with regards to the interests of the people who are thriving and planning their lives in that particular territory. Life plans are in important ways dependent on the specific nature of the area in which they were established and designed. So for example, for farmers to continue performing their activities it is important that they can rely on a suitable geographical area. Relocation to the Brazilian rainforest would mean a drastic change in their habits and plans and in the success of their venture. Geographical areas are also the location of religious practices, some of which may depend on the particular land in which they have been traditionally performed. The Black Hills have religious significance for the Sioux, and the Blue Lake is the center of the Pueblo Indians' rituals.²¹

Stilz notes that displacing people from one territory creates important disruptions in their lives, and the wrong that they suffer cannot be explained without making sense

¹⁸ Stilz call this last requirement the *no wrongdoing constraint*. I will not examine this element of her theory because it regards the issue of historical injustice, which I do not address here. Suffice to say that the no wrongdoing constraint poses that the legitimate occupiers of a land must not have violated the right of occupancy of previous occupiers through "no fault of their own" (*Nations, States, and Territory*, 17; Stilz "Occupancy Rights and the Wrong of Removal," *Philosophy and Public Affairs* 41, no. 4 (2013): 352-353). It is not easy to define what exactly Stilz means with "no fault of their own" (Ypi, *A Permissive Theory*, 300). However, she explicitly rules out cases in which individuals are brought up with expectations that their people will one day conquer lands that they were promised or that they occupied in the remote past. According to Stilz, these expectations are too farfetched and detached from reality to be considered objective (*Nations, States, and Territory*, 585 n23).

¹⁹ In fact, there may be competing legitimate titles to that same territory, for example those of populations that were unjustly displaced from there before.

²⁰ David Hume, *A Treatise on Human Nature* (Oxford: Oxford University Press, [1888] 1978), Book III.

²¹ Stilz, *Occupancy Rights*, 335.

of the special way in which individuals rely on a particular geographical area.²² The principle of occupancy pursues the values of stability of expectations, acknowledging a *prima facie* consideration for the arrangements that are currently in place.²³ The success of pursuing one's life-plans depends to a significant extent on the relative security of a person's expectations regarding his or her assets and regarding the behavior of others with respect of those holdings. People think of their lives as protracting into the future, and live in the assumption that what they build today will not disappear tomorrow. An important aspect of Stilz's proposal is that the ends that are worth protecting are only those on which many other personal choices depend, and according to which individuals structure their aims and values.²⁴

For the occupancy theory, then, individuals are at liberty (that is, they have no duty not) to establish their life plans within any territory that is not already legitimately occupied by other people. They also have a duty to respect others' occupancy rights. This means that they have a duty not to remove the occupiers from the area and a duty not to interfere with their use of the space in ways that significantly undermines their shared social practices. This includes also leaving enough space for the occupiers to pursue their located life-plans.²⁵ Moreover, as for the legitimate state theory, any state that may be established within the particular territory that individuals occupy must protect basic human rights and enact some type of democratic system of political participation.²⁶ Once existing institutions have

²² Many other authors share this intuition (Henry Sidgwick, *The Elements of Politics* (London: Macmillan, 1987); Jeremy Waldron, "Indigeneity? First Peoples and Last Occupancy," *New Zealand Journal of Public International Law* 1 (2002): 55-82; Simmons, *On the Territorial Rights of States*; Tamar Meisels, *Territorial Rights*, 2nd ed. (Springer, 2009); Miller, *Territorial Rights*). However, within the indirect theories, only Stilz points at the characteristically territorial nature of life-plans (*Occupancy Rights*, 346).

²³ Waldron, *Indigeneity?*, 71. Quoting Grotius and Cicero, Waldron suggests that, although unreasonably conservative, the principle of actual occupancy has an intuitive strength that has survived the passing of time.

²⁴ Stilz calls them "comprehensive" (*Occupancy Rights*, 337) but I prefer to use Lomasky's terminology of 'directive ends' (Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987), 57).

²⁵ There are a number of ways in which the requirement may be interpreted. One may argue that each individual should have access to equal space to establish and form one's life plans. Another weaker interpretation of the requirement is that others must have sufficient opportunities to establish located life plans. This is the interpretation preferred by Stilz, who argues that others should enjoy access to "sufficient natural and social resources" before they can be subject to a duty to respect others' occupancy rights (*Occupancy Rights*, 354).

²⁶ *Ibid.*, 333.

established justice somewhere and represent their subjects, they can legitimately exert territorial jurisdiction and their title may not be challenged.

However, some groups may enjoy occupancy rights and also hold a residual meta-jurisdictional power even if they are subject to just institution. In Stilz's view groups that were once subject to the same minimally-just political institutions have an immunity against others establishing political institutions within the same territory because states, even if they are just, must not be usurpers (recall condition (2) at the beginning of this section). The groups that enjoy meta-jurisdictional authority must be a people that has a history of cooperation together. A people is not a naturally existing collective body: the individuals making up a people belong to the same group not in virtue of some cultural characteristic, but because of their common past participation in legitimate political institutions.²⁷ These groups may not be at liberty to reject existing just political institutions, but only those that are illegitimate, or that are legitimate but foreign.²⁸ In these cases, the group is permitted to revive the former just political arrangements that it once supported and possibly also secede from existing institutions.

It is worth reminding here that the requirement for legitimate political authority imposes on groups some limitations on the political arrangements that they must hold if they wish to be holders of territorial jurisdiction. For the legitimate state and occupancy theories, individuals ought to establish democratic institutions like those of a nation state to be able to hold jurisdictional titles to territory. This reduces significantly the type of communities that may be eligible to hold territorial jurisdiction, excluding among others groups such as, for example, the Whanganui river Maori tribes in New Zealand that are currently being given some form of territorial jurisdiction even if they do not hold state-like or democratic political institutions. These powers are accorded to these communities on the basis of the fact that occupancy rights are not enough to protect their ability to uphold complex social practices, which depend also on upholding territorial jurisdiction within the territory that the community occupies. In the case of the Whanganui river tribes, it

²⁷ Political groups, in fact, can only be established through the realization of institutions that represent their members' general will (Stilz, *Nations, States, and Territory*, 579).

²⁸ Stilz poses three conditions: (1) their previous state has failed, (2) their previous state has become illegitimate, or (3) their previous state has been usurped by a foreign authority.

was recognized that they had jurisdiction regarding the use and exploitation of the river Whanganui, on the basis of which the New Zealand central government had to recognize the river as a juridical person and refrain from development plans not in line with the tribes' beliefs and practices regarding their waters.

However, for the occupancy theory, occupancy rights do not include resource rights, or territorial jurisdictional powers. And in some cases, they also do not include meta-jurisdictional powers. They, thus, do not offer a ground for territorial jurisdiction and a conclusive factor in favor of the occupiers' legitimate territorial jurisdiction within a geographical area, and would not allow for the Whanganui river tribes to hold territorial jurisdiction. For the occupancy theory a group may hold territorial jurisdiction if it demonstrates the ability to establish minimally just institutions. Stilz suggest that this can be achieved if the group credibly protects its members' basic rights through the establishment of partial institutions, which may emerge within the jurisdiction of another state like, for example, administrative divisions,²⁹ and if the group has a history of political cooperation in the form of a state.³⁰ But groups such as the Whanganui river tribes do not meet either of these requirements as they are organized in tribes and never formed a state in the past.

Moreover, for Stilz a group with residual meta-jurisdictional powers may legitimately secede from a state that is currently upholding just institutions. This perspective may run into difficulties with regards to existing competing demands of territorial jurisdiction. For example, in a multinational state many groups may have a history of political cooperation and at the same time occupy legitimately the same territory.

Think for example of North Italy. The area of Piedmont and Lombardy had been under the jurisdiction of respectively the French and Austrian states for large part of their history. The northern communities still assert the right to political independence on the basis of their cultural differences that, they argue, impacts significantly on the type of institutions that they would rather support were they independent. However, within the northern Italian regions that have a common past of political cooperation there are also smaller sub regions, like Trentino-Alto Adige,

²⁹ Stilz, *Nations, States, and Territory*, 594, 599.

³⁰ *Ibid.*, 591.

Friuli-Venezia Giulia, Val d'Aosta, or Veneto. These regions assert an equally significant past of political cooperation, but they believe this past would be best honored, and their interest best protected, if they could join Austria in the case of Trentino and Friuli, or secede independently from the Northern regions of Italy in the case of Aosta and Veneto. This complex example of intertwined national groups shows that there is more than one group that may count a proud history of political cooperation and that may demonstrate the ability to establish just institutions. The occupancy theory does not offer any tool to navigate these complexities, and it fails to indicate a single set of jurisdictional powers over territory in cases that are complex but all too often common.

Finally, the occupancy theory may allow a group to settle in a land that is occupied by people who do not hold meta-jurisdictional powers and who are not already subject to minimally just institutions, and take control of the territory that they occupy. Think for example of the case of West Sahara. Sahrawi people are poorly represented by a mainly military organization whose ability to establish just institutions is currently under scrutiny. For the occupancy theory, Sahrawi people do not enjoy a legitimate title to the land that they occupy because they cannot demonstrate the ability to establish just institutions. However, this does not seem to be enough of a reason to give Morocco or Spain any conclusive justification in favor of either country's right to establish just institutions there. Both countries have historically controlled those areas and both demonstrate the ability to uphold minimally just institutions.

Before I examine the Permissive theory, I must address one final issue with the statist indirect theories that has to do with the functionality principle. The functionality principle holds that a state has a right to a territory if this right is necessary for the state to secure minimal standards of performance. This principle is proposed by the supporters of the legitimate state and occupancy theory to hold that the value of territorial rights resides in them being necessary for the proper maintenance of the state's basic functions. The justificatory role of the functionality principle is thus not constitutive of territorial rights, but it identifies the value that territorial rights protect when they are accorded. Moreover, as Armstrong persuasively argues, the principle can be used to limit the extension of territorial

rights to the territorial holdings that are in fact necessary to the effective functioning of minimally just institutions.³¹

The direction of the justification of territorial rights through the functionality principle goes, thus, from the establishment of just institutions within a territory to the validation of territorial jurisdiction and other territorial rights on that particular territory. The principle does not offer any insight on why or how the group can legitimately take control of a territory and establish political institutions there. In fact, it is quite plausible that the establishment and development of just institutions will not be instantaneous, and that the group will have to exclude others from the enjoyment and exploitation of a territory long before it is able to effectively hold just institutions there and achieve the goal of internal political justice. Recall also that the occupancy principle elaborated by Stilz does not offer a solution to this problem, as it establishes only a freedom to occupy a land and a claim that others do not displace them. The few people who hold a residual meta-jurisdictional right have this power because at a certain point in time they had established political institutions there. However, this leaves unexplained whether they had a right to acquire control of that territory at that time.

In the following subsection I examine the permissive theory. I argue that it does not suffer from the complication related to the functionalist principle, but that this imposes on the approach another set of limitations. Namely, the permissive theory fails to address the particularity requirement and is largely insensitive to the demands of global justice.

2.3 *Permissive Theory*

The permissive theory makes use of the permissive principle that holds that states have territorial rights if such rights are necessary for the establishment of cosmopolitan justice. According to this view, territorial rights are not justified in a conclusive manner, but they are justified provisionally and conditionally to the

³¹ Armstrong, *Against Permanent Sovereignty*, 11.

establishment of cosmopolitan political institutions that fully realize the value of cosmopolitan justice.³² Similarly to the legitimate state theory and the occupancy theory, the permissive theory maintains that only a state can be the holder of territorial jurisdiction. The permissive theory shares with the previous two accounts the preoccupation that rights ought not to be the result of the imposition on others of a unilateral will. This requires that shared political institutions are established to ensure a system that guarantees that each individual in the relevant community is subject to the general will of the community, and that each state is subject to institutions that represent and protect the general will of the international community.

The permissive theory differs significantly from the previous proposals because it accepts that the taking of territory from states is a violation of the Kantian principle of right. According to this account, the taking of territory is not dissimilar to individuals' acquisition of property and the problem of the unilateral will. I have exposed the problem of the unilateral will in section 2.1. In short, every individual action aimed at using or acquiring external objects can never be conclusively justified unless the individual subjects his will to the general will. The state, by being the exclusive legislator and enforcer of duties, acts as a collective and shared political institution through which the general will can be expressed. The submissions of individual claims and duties to the general will frees individuals from the risk of conflicting individual interpretations of entitlements. For individuals' entitlements to be consistently valid, in fact, there needs to be one ultimate authority that ensures that individuals avoid mutual arbitrary interference in each other's exercise of freedom. The arbitrariness of the imposition of a unilateral will, then, can be mitigated by the commitment of the individual to make his will consistent with that of others.³³

Ypi argues, however, that the establishment of nation states does not solve the problem of the unilateral will with regards to the appropriation of territories in the international community. Nation states establish collective rules of property only among the community that is subject to their legislation. However, individuals will

³² Ypi, *Permissive Theory*, 308.

³³ *Ibid.*, 298.

influence each other also at the international level, where the jurisdiction of nation states fails to establish collective shared institutions. This effectively means that any title to an external object established by shared domestic institutions is still not conclusive unless the title is recognized, specified, and enforced by a “universal union realizing the principle of right.”³⁴ The universalization of the principle of right is equivalent to the establishment of cosmopolitan political institutions that are able to express the general will of the collection of individuals around the globe. Ypi suggests that such institutions will look like a free league of states performing regulative functions as well as giving support for members of the international community towards the development of just domestic institutions and international relations. In particular, cosmopolitan institutions will have authority within areas concerning the drawing of boundaries, the allocation of the burdens of migration, and the distribution of natural resources.³⁵

The legitimacy of the domestic, international, and cosmopolitan set of political institutions is interdependent to the extent that if one fails to enact the general will the other levels in which the general will is expressed will also lose their rightful character.³⁶ Unilateral acquisition is permissible only if it is ascribed within a system of rights that expresses the united will of all individuals. Joining a particular state only gives individuals a provisional title to what they have acquired within the domestic system of rights. Their titles remain conditional to the establishment of global institutions that express the general will of all individuals around the globe and all individuals in time (including future generations).³⁷

Since the required cosmopolitan institutions do not yet exist, the taking of any territory is not just but is only permissible. States acquire titles to territorial jurisdiction on the grounds of the permissive principle according to which if to promote cosmopolitan justice one has to act in violation of cosmopolitan justice, then the realization of cosmopolitan justice can be suspended and its violation allowed.³⁸ To establish cosmopolitan institutions able to enforce the universal will,

³⁴ Ibid., 299.

³⁵ Ibid., 307-308.

³⁶ Ibid., 299.

³⁷ Ibid., 300.

³⁸ Ibid., 289.

we must allow that groups of individuals organize themselves into domestic states that offer a first approximation towards the universalization of their separate wills.³⁹ This, however, constitutes a violation of the principle of cosmopolitan justice, which requires instead that appropriation is impermissible unless it is determined and enforced by cosmopolitan institutions. However, the permissive principle suggests that we can allow for something that is in violation of our goal as long as we commit to promote the ultimate value that would make our action legitimate.

The principle in this form also explains why states are allowed to take control of particular territories. Given that taking control of a particular territory is necessary to establish domestic institutions, and given that domestic institutions are the first approximation to the establishment of cosmopolitan institutions, unilateral acquisition may be permitted, even if it is in violation of the principle of right.⁴⁰ However, until the states recognize the authority of universally inclusive institutions, these particular holdings (and the holding of the individuals within territorial jurisdictions) will remain merely provisional.⁴¹

This means that state's territorial rights are merely provisionally and conditionally justified in the present conditions. If, however, conditions were to change in a way that would make territorial rights useless to the achievement of cosmopolitan justice, then territorial rights would lose their rationale, and states would lose their territorial rights. The permissive principle, thus, does not provide states with a strong entitlement to the exclusive use of a land. It doesn't in fact provide any agent with a conclusive and strong entitlement to the enjoyment of any of their rights until the cosmopolitan political community has been established.⁴² The direction of the justification of territorial rights through the permissive principle goes, thus, from the merely permissible (but not just) control of a particular territory to the establishment of just national and cosmopolitan institutions, which then validate the territorial rights that until then had remained conditional.

³⁹ For this view, any form of political authority will represent the general will, even if the state thus formed does not meet the minimal requirements of justice. Thus, unjust states can also be considered to embody the general will, given their role in enforcing a system of laws, and a preferable condition to the state of nature.

⁴⁰ Ibid., 303, 305.

⁴¹ Ibid.

⁴² Ibid., 300.

The conditional and provisional nature of these entitlements have important implications for what individuals and states are permitted to do with regards to states' provisional territorial holdings. Ypi identifies two non-ideal cases that may challenge the permissive theory: the first is the case of a minimally just state that refuses to submit to shared political institutions, the second is the case of a group that has failed to establish even minimal political institutions that are able to enforce the rule of law domestically. In the first case, Ypi argues, the existing state still retains some provisional entitlements to the territory its people occupy. Even if it refuses to conform to the cosmopolitan principle of justice, others states have no right to, for example, unilaterally annex the uncooperative state's territory. Nor do other states have a right to coerce the recalcitrant state to submit to cosmopolitan principles of justice. The permissive principle is at work to justify territorial holdings, allowing us to establish some basis for the institutional promotion of cosmopolitan justice, such as the establishment of nation states. Once these bases have been settled, the obligation to overcome any wrong that the existing states may perpetrate falls on its citizens through the democratic system of decision-making and through the provisions of the rule of law.⁴³

Any disruption of the existing system of political authority – however far from the cosmopolitan ideal – constitutes a step back towards unilateralness that ought to be avoided. The priority of political institutions explains also why individuals may be coerced into joining state-like institutions, but states may not be forced to submit to international standards of cooperation. Only individuals must leave the state of nature by submitting to shared political institutions. Once this happens, they are themselves under an obligation to pursue the principle of right, and others may not undermine political institutions that keep individuals out of the state of nature. This effectively allows minimally just states to enjoy robust territorial rights even if they do not comply with the principle of cosmopolitan justice. For this reason, even if the

⁴³ Ibid., 305. It is unclear in Ypi's work why the permissive principle is able to justify existing territorial rights but cannot be employed to pursue cosmopolitan justice through imposing cosmopolitan institutions on a state that has achieved at least minimal standards of justice. The imposition of cosmopolitan institutions would violate cosmopolitan justice because it would violate the state's territorial jurisdiction and, thus, individuals' attempts to independently exit the state of nature and carry out their natural duty of justice. However, the permissive principle may be used to waive the duty that we have to respect existing institutions, if the violation of this duty is needed to promote cosmopolitan justice.

permissive theory poses demanding requirements for territorial rights to be fully legitimate, it effectively allows minimally just states to ignore the demands of global justice.

In the second case, where communities fail to establish institutions that are minimally just, Ypi argues that communities have at least established actual possession. Actual possession, different from ownership, is the mere title that communities have to continue using what they physically control. However, once their members lose physical control over their land, they lose their possession. Since informal groups lack political institutions that mend their members' unilateral acquisition, they cannot be considered having any collective territorial rights – not even provisional – and they can only enjoy possession on what they can separately and physically control. The lack of institutions that express the general will indicates that the group effectively has not left the state of nature and that rights cannot be legitimately established. The same is true for states that do not meet the minimal requirements of justice. These organizations may not assert any rights past what their individual members are able to physically control.

But what normative incidents does possession entail? Ypi argues that unilateralness is a threat not only when groups that do not uphold minimally just institutions perpetrate it, but also when outsiders attempt to settle in regions occupied by them. Thus, either type of unilateralness needs to be mitigated to eventually realize the principle of right. Unilateralness from informal groups is mitigated by the fact that the occupiers' possession title accords outsiders' liberty to visit the groups' land. Meanwhile, the outsiders' unilateralness is mitigated because the current occupiers' possession of their land includes a claim that others do not permanently settle or establish territorial jurisdiction in the territory they possess or force them to join their political institutions.⁴⁴

The permissive theory is not subject to the *in rem* problem because no agent has a robust and conclusive title to the land that they occupy and control. Although existing states may be permitted to enjoy robust territorial rights (even, to some extent, if they do not meet minimal conditions of justice), they ultimately may not

⁴⁴ Ibid., 306, 309.

assert legitimate territorial jurisdiction anywhere until they have established and effectively upheld cosmopolitan institutions. For the permissive theory, these institutions accord to nation states territorial rights on the land that they possess, and validate any existing practice on that territory that represents a step away from the state of nature.

However, like the legitimate state theory, the permissive theory does not explain why the group that establishes and upholds political institutions has a right to perform its natural duty of justice in the particular territory that it has come to occupy. In response to the particularity issue, Ypi introduces the right to possess a land. This right gives to occupiers a claim that others do not permanently occupy or establish territorial political institutions on the land that they possess, and a freedom to occupy and use the possessed territory to the extent that their physical capability permits. The right to possess, however, does not exclude that outsiders may be able to settle and establish political institutions on territories that current individual members of the occupying group do not physically control.

For the permissive theory, then, Europeans had a freedom to settle and a power to establish institutions within the borders of areas that nomad populations of Native Americans used for their sustenance, in particular when these populations were not present in the same geographical area where the Europeans' first settlements. Other possible scenarios would be that Morocco may be able to establish political institutions controlling the West Sahara, given that its occupiers would have a legitimate title only to the limited land that they are able to physically occupy and use for their activities. Much of the West Sahara is uninhabited, and no one has effective physical control there. Although Morocco may not be able to coerce Sahrawi into joining its political institutions, it would be permitted to extend its territory and annex land that could enhance its presence in North Africa, by including within its jurisdictional borders territories that are not physically used by the Sahrawi.

Although the permissive theory includes a limitation on outsiders' ability to establish territorial jurisdiction somewhere, this limitation applies only to the land that is physically controlled by individuals occupying a limited area and not to the territory that these individuals may need to protect their social practices. Until the group is able to meet the standards of internal justice and cosmopolitan justice, in fact, social

practices do not enjoy any particular protection, and a group's right to carry out its natural duty of justice there, and not somewhere else, remains unaccounted for. Given that the permissive theory does not explain why the group has a right on a particular territory, and not another, it fails to address the particularity requirement.

3 Collectivist Indirect Theories

Collectivist indirect theories maintain that groups, and not only states, can legitimately demand territorial rights if the territorial jurisdiction there is functional to the establishment of minimally just institutions. For the collectivist indirect theories a group has a power of territorial jurisdiction if it can demonstrate that it can establish just institutions that represent the shared conception of justice of its members, or if it has established functional institutions that distribute the benefits of cooperation to their subjects. Such requirements constitute the minimal standard of performance that a political institution should perform to hold legitimate political authority over people. Having established justice, or the ability to do so, accords the group legitimate political authority over its members. Subsequently, a group acquires territorial jurisdiction on the basis of the functionality principle, given that territorial jurisdiction is necessary for the exercise of legitimate authority over people. In this way, a group also establishes rights to resources and to control borders.

I examine two versions of the indirect collectivist theory: Nine's collectivist Lockean theory and Wellman's freedom of association theory. The former employs the principle of labor mixing, the principle of efficiency, and the principle of self-determination to establish an independent justification of the title to particular territories. I argue that this approach successfully addresses the particularity requirements, but nevertheless it fails to offer a conclusive justification of territorial jurisdiction against competing demands. However, as it will become clearer when discussing direct theories, the cost of employing the labor mixing principle is that the theory needs an account of original acquisition.

For the freedom of association theory, the presence of a community in a particular land does not determine any entitlements to that land but is a matter of chance.

However, on the basis of their right to form political associations the occupiers may establish political institutions and then acquire territorial rights there. Because of the fact that occupancy is arbitrary and does not give rise to any entitlements on the particular territory occupied, this approach does not offer a compelling reason as to why occupiers of a territory may legitimately take exclusive control of a particular territory. I will also show that the theory does not manage to address the *in rem* problem.

At the end of this section, I suggest that the choice of allowing communities, and not only states, to hold territorial rights allows these theories to meet the challenge of ethnocentrism. However, collectivist indirect theories are also sensitive to the demands of global justice, particularly when territorial rights are limited to only those titles that are functional to the establishment of justice (for the collectivist Lockean theory), or for the effective functioning of institutions that are able to distribute the benefits of social cooperation (for the freedom of association theory).

3.1 *Collectivist Lockean Theory*

Nine argues that groups that fulfill some basic requirements may legitimately held territorial titles, even if they do not constitute themselves as states.⁴⁵ The rightful holders of territorial jurisdiction must show the ability to uphold institutions that meet minimal standards of justice, and their members must share a conception of the good.⁴⁶ Groups must not necessarily share a national identity, nor they must necessarily have a long-standing history of cooperation together. They must, however, share a basic understanding of what it means to establish minimally just institutions and share “common political sympathies.”⁴⁷

The collectivist Lockean theory offers two separate arguments: the first aims to justify a general right to territory, while the second focuses on grounding titles to

⁴⁵ Nine, *Global Justice and Territory*, 61, 73.

⁴⁶ Ibid., 26-44.

⁴⁷ Ibid., 69; John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2002), 23, as quoted by Nine.

particular geographical areas. The argument for a general right to territory relies on the functionality principle, which pursues the establishment of minimally just institutions.⁴⁸ Nine argues in this regard that the satisfaction of basic human needs in conditions of scarcity is impossible for single individuals to meet, but it requires a complex set of goods that are achievable only by means of a collective effort.⁴⁹ Thus, an overarching authority is needed to ensure stable access to water and food, and also to meaningful social interactions based on mutual trust, to ways in which one can express his ideas, and so forth.⁵⁰ Nine appeals to a capability theory, for which individual basic needs cannot be considered merely as the material need to nourishment and shelter, but they include a more complex set of goods that allows the individual to flourish and pursue happiness by controlling their own environment.⁵¹

Nine argues that the scope of territorial holdings must be limited to taking into consideration other individuals' natural rights to preservation. Because territorial rights exclude others from the enjoyment of land and resources, they are in some sense similar to the acquisition of property.⁵² The acquisition of land must respect the competing demands to territory and resources that others advance to pursue the satisfaction of their basic needs, and is thus limited by a version of the Lockean proviso on acquisition.⁵³

The argument for a particular title to territorial rights draws more distinctively from the Lockean theory of property, with the difference that Nine's argument defends the right to territory of an irreducibly collective political community and not of an individual. The theory uses the principles of labor mixing, efficiency, and self-determination to justify acquisition of resources and territorial jurisdiction.⁵⁴

⁴⁸ Nine, *Global Justice and Territory*, 32.

⁴⁹ Ibid., 106.

⁵⁰ Ibid., 36.

⁵¹ Nine here uses Nussbaum capability theory, which suggests that individuals don't only need material control over the objects needed for their subsistence, but they also need political control to participate in choices that considerably affect their lives. For this requirement to be fulfilled, then, a minimally-just political community must provide the individual with the instruments for political participation, free speech and association (Ibid., 37).

⁵² Ibid., 13.

⁵³ Ibid., 49.

⁵⁴ The principle of self-determination is the corresponding collectivistic version of Locke's principle of individual self-government. The principle of self-government holds that a man, to be autonomous,

According to Nine, an agent worthy of territorial rights must be able to change the land, creating a relationship with it that is morally valuable. The value of the relationship to the land that a political community establishes lies in the realization of the values of desert, efficiency, and collective autonomy protected, respectively, by the principles of labor mixing, efficiency, and self-determination. These principles are all necessary elements of a legitimate title on territory, but neither is sufficient to establish that title.

To hold a right to a particular territory, a community must be able to change the land and create a relationship with it through the labor mixing principle. In its original formulation, the labor mixing principle holds that an agent has a valid property title in a territory if the material value of that object is attributable to the agent. Nine, however, suggests that since the ultimate function of territorial rights is that of establishing minimal conditions for the satisfaction of human needs, the value that the collective must realize in the territory is that of justice.⁵⁵ A group, then, has a legitimate title in a specific territory if its actions change the land to effectively establish and maintain just political institutions, which Nine identifies as the ability to “provide secure access to the objects of basic human needs for members and to respect the basic human rights of all persons.”⁵⁶

This special relation with the land gives rise to property-like limited entitlements on the use and exploitation of resources within that territory. Even if the people occupying a territory fail to establish and uphold minimally just institutions, their occupancy there enjoys some protection. Others may not legitimately freely use the group’s resources or annex their territory.⁵⁷ However, these claims against others settling within the group’s territory are conditional on the group’s ability to demonstrate some type of political unity and the desire to cooperate as one political agent to enjoy their right to collective self-determination.⁵⁸ In fact, creating mere material value on the land one occupies, on the basis of continuous use and

needs his right to the exclusive control of property respected (Ibid., 97; A.J. Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 85).

⁵⁵ Nine, *Global Justice and Territory*, 105.

⁵⁶ Ibid., 50.

⁵⁷ Ibid., 67.

⁵⁸ Ibid., 153.

exploitation, may at best generate property rights in that particular land, but not also jurisdictional powers.⁵⁹

Attachment for Nine is, in Kolers' terminology, a "performance" type of attachment. This is clearer in her discussion of overlapping people with competing right to collective self-determination. To hold legitimate territorial titles, a group that has a right to self-determination must be "big enough (and small enough) to have the capacity to establish minimally just institutions," and the level of independence from other territorial just political institutions will depend on the capacity of the group to maintain minimally just institutions.⁶⁰

The collectivistic indirect theory is subject to the *in rem* problem in the same way that the occupancy theory is. Recall the example of the independent movements in North Italy. Those regions have demonstrated the ability to uphold just institutions by means of their activity as special regions of the Italian Republic. Moreover, they certainly share a similar commitment to self-determination and a conception of justice that they express through their cultural unity and their political movements for independence. In that scenario, it is unclear which community in Nine's theory should be given territorial jurisdiction and, possibly, a right to secede. Does the league of the Italian northern regions have a legitimate right to exercise territorial jurisdiction, given their demonstrated ability to organize themselves as a unitary political movement with demonstrated administrative ability to uphold minimal standard of justice? Or should each region that desires more independence, and that also shows the ability to administer justice, be accorded territorial jurisdiction on the territory that overlaps with that demanded by the northern Italian regions' league? The attachment account gives an explanation as to why a group that is able to establish just institutions acquires rights on a particular territory, given that the particular territory occupied is a necessary condition for the establishment of justice. However, it remains unclear which group and which individuals have a title to territorial jurisdiction in situation of conflict.

⁵⁹ Cara Nine, "Resource Rights," *Political Studies*, 61 (2013): 242.

⁶⁰ Nine, *Global Justice and Territory*, 67.

One way to address the uncertainty regarding who holds territorial jurisdiction in a particular territory is the principle of efficiency. The principle holds that all other things being equal, “if a *system* of collective territorial rights makes the most efficient use of land, then it is to be preferred.”⁶¹ Nine makes use of this principle to strengthen the argument for the acquisition of particular territory, and to identify which among the groups that may establish territorial jurisdiction somewhere should be given priority. In its original formulation, the principle pursues the value of human preservation. All things being equal, Locke suggests, a man who can use his property more efficiently is making the land more beneficial for him and his family.⁶² This alleviates the burden of satisfying his basic needs from the resources held in common, and it allows more people to flourish.

But the value of a land for a community is not easily compared to the value of a land for another community.⁶³ For some groups, a river may be the source of inspiration and religious attachment, for others it may represent an essential source of sustenance and transport. Nine suggests, however, that some benefits related to the use of land are universal and can be enjoyed by anyone, regardless of their cultural affiliations. For example the more food, water, natural resources, shelter, and other means of subsistence are extracted from the land, the more people can benefit from it.⁶⁴ The collectivistic Lockean theory offers efficiency as a tool to balance the community-specific narrative regarding the value of a land, and the universal standard of efficiency according to which territory protects universal human needs and goods. The theory gives, thus, ample space for a community to develop its own conception of the good and of the valuable ways in which territory may be used, addressing successfully the challenge of ethnocentrism. However, it also ensures that the use of land and the exclusion of others from a territory respects some universal idea of prosperity and protects individuals’ fundamental interests.

⁶¹ Ibid., 88.

⁶² Waldron, *The Right to Private Property*, 107; John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 2005), II, 28; Simmons, *The Lockean Theory of Rights*.

⁶³ Avery Kolers, *Land, Conflict, and Justice: A Political Theory of Territory* (Cambridge: Cambridge University Press, 2009), 170.

⁶⁴ Meisels, *Territorial Rights*; Nine, *Global Justice and Territory*, 95.

Nevertheless, the balance between universal needs and community specific understanding of territory is significantly in favor of the community and how it prefers to organize itself. In fact, the principle of efficiency cannot be thought of as a maximizing principle. If we had to always maximize efficiency, Nine argues, territorial rights would be extremely instable. Every time a community is able to make better use of a land, territorial holdings should be redesigned. Maximizing the principle of efficiency would fail to promote the value of human preservation, because the disruption caused by the continuous remodeling of territorial holdings would deprive individuals of the stability needed to pursue their basic interests.⁶⁵

Because the principle may not be used as a radical argument in favor of remodeling territorial holdings, efficiency does not provide a factor in favor of one or the other group that may demonstrate the ability to uphold just institutions. It seems that, in the case of the Northern Leagues of Italian regions and the separate regions of Trentino, Friuli, Aosta, and Veneto, we may not take a decision on the basis of their ability to efficiently use the territory, as long as each candidate is able to use the land to some level of efficiency. In the case of Italy, one may argue that, since the Italian Republic is able to uphold minimally just institutions and use the territory with some acceptable level of efficiency, the principles of efficiency, labor mixing, and self-determination may simply work in favor of the Italian government maintaining robust territorial control of those regions. However, if Italy were not minimally just, the collectivistic Lockean theory would fail to point at one preferred candidate among the different regions and the league, given that all these groups display the ability to uphold efficient and minimally just institutions.

Finally, because the theory relies on some account of acquisition of territory, and because efficiency does not in fact give us any reason to interfere with existing territorial holdings (as long as who holds them upholds minimally just institutions), the theory is in need of some account of original acquisition. In fact, with the exception of some circumstances when a group's right to self-determination takes

⁶⁵ Nine, *Global Justice and Territory*, 96. In another version of the theory Nine argues that exclusive rights to territory can be established only to the extent that these are needed for ensuring the group's successful achievement of self-determination. This functionalist version of the theory is less favorable to the claims of groups, and limits their demands on the 'commons' and on resources found deep under the group's territory (Armstrong, *Against Permanent Sovereignty*, 12).

priority over existing territorial arrangements,⁶⁶ territorial jurisdiction is securely left to those who legitimately uphold it and who have acquired it through the labor mixing principle or through legitimate transferal.⁶⁷ Giving an account of original acquisition is, however, prominently difficult, especially in the case of collective territorial holdings. In fact, few existing states may be considered the first legitimate acquirers of territory, and even fewer can recount a flawless history of legitimate transferal of territory from the original acquirer.

3.2 *Freedom of Association Theory*

Wellman develops the freedom of association according to which a group holds territorial jurisdiction because jurisdictional powers over territory are necessary for the effective functioning of legitimate political institutions. Legitimate political institutions are those that protect individuals' freedom of association, and that distribute the benefits of cooperation to all members of society.⁶⁸ Given that the group needs jurisdiction over the territory that its members occupy to effectively distribute the benefits of cooperation, then the group that upholds effective legitimate institutions also upholds territorial jurisdiction.

Because the theory employs the functionality principle, it faces the same complications that burden the legitimate state, occupancy, and collectivistic Lockean theories. First, it fails to provide a conclusive argument in favor of the territorial title of one group or the other, in case of conflict. If the requirement for territorial jurisdiction is that the group has chosen to associate, and if it effectively upholds minimally just institutions in that territory, then different groups that share the same territory – like the ones occupying the Northern regions of Italy – may be rightful candidates for the same title. One further complication that this theory encounters with regards to the *in rem* problem is that the groups that may legitimately hold territorial jurisdiction need not be only states. They only need to be groups that are

⁶⁶ Nine, *Global Justice and Territory*, 96, 97.

⁶⁷ Ibid., 78.

⁶⁸ Wellman, *A Theory of Secession*, 11.

large enough and dense enough to uphold effective institutions that distribute the benefit of cooperation among their members, and that enjoy the approval of the majority of their subjects.⁶⁹

This widens considerably the class of possible right-holders that may effectively establish political institutions within a territory that they share with other groups. These types of institutions, in fact, often coexist with one another. Consider for example the tribal subnational groups like the Whanganui river tribes who are subsumed under the central government of New Zealand and share the territory with its citizens, but that also uphold institutions such as tribunals and legislative bodies to regulate the use of natural resources. In the case of disputes, the freedom of association theory provides no tools to determine which of these groups may be considered having territorial jurisdiction over shared geographical areas.

Moreover, for the freedom of association theory, the functionality principle only identifies the value that territorial rights protect when they are accorded. This means that exclusive territorial control of an area is validated once it is instrumental to the proper functioning of political institutions. Even in this case the functionality principle does not offer any insight on why or how the group can legitimately take control of a territory and establish political institutions there. This leaves open the possibility that a group may forcibly exclude others from the enjoyment and exploitation of a territory long before it effectively holds political institutions there.

The second issue with the theory is that it does not address the particularity requirement. For Wellman, the presence of a group in a particular territory is an arbitrary fact that has no normative importance. It is unclear whether the group may legitimately establish institutions precisely there and exclude others from the enjoyment and control of that particular territory.

Finally, the theory is able to address the challenge of ethnocentrism by ensuring that the collective that holds territorial rights upholds institutions that benefit all its members and that are ultimately chosen and supported by the majority of its subjects. As territorial rights are functional to the exercise of individuals' freedom to

⁶⁹ Ibid., 62.

associate, they also protect political associations in the way they are intended by their subjects. In fact, the theory does not pose requirements regarding the type of institutions that must be established or the type of benefits that these institutions must secure for their members, as long as they are compatible with the demands of basic human rights.⁷⁰ However, it is unclear to what extent groups that have achieved rights to territorial jurisdiction may exert powers regarding resources within their borders and have exclusive freedoms to use and exploit those resources. Unless the principle of functionality is used to limit the extent of resource rights, the freedom of association theory may be unequipped to address the demands of global justice.

4 Conclusions

In this chapter I have examined indirect theories and their shortcomings with regards to the *in rem* problem and the particularity requirement. I have showed that all the indirect theories suffer from the *in rem* problem with exception of the permissive theory, and that they fail to meet the particularity requirement, except for the collectivistic Lockean and the occupancy theory. However, for all indirect theories the functionality principle poses an important limitation that is related to the inability to explain and justify the exclusiveness of the title to territorial jurisdiction of existing territorial rights holders. The functionality principle maintains that territorial jurisdiction is justified because it is functional to the effective functioning of just institutions. However, a group may not legitimately demand territorial jurisdiction unless it is able to establish or has establish just institutions somewhere. It seems, thus, that to establish just institutions or to acquire the ability to do so a group needs territorial jurisdiction, but that territorial jurisdiction is only justified when the group has achieved justice or the ability to establish just institutions.

For indirect theories the functionality principle provides the moral justification of existing territorial rights, but fails to explain whether the group had a right to control a territory to begin with. To acquire territory a state or group has to necessarily forcibly take control of it unilaterally, before it can develop the ability or establish the

⁷⁰ Ibid., 54.

institutions needed to uphold justice there. Although the functionality principle may suffice to provide a justification of existing territorial holdings, it does not address sufficiently those cases where territorial holdings are being created because new people acquire uncontrolled territories, or where existing territorial holdings are challenged by radical demands of groups that have the aspiration to pursue their own idea of justice.

For completeness it is important to mention that indirect approaches may not be individualistic. The reason is that for indirect theories, the validity of territorial rights rests on the fact that the group holding territorial rights has political authority over its members. An individualist indirect theory would suggest that individuals could hold territorial rights only if they have established political institutions there, or if they can demonstrate their ability to do so, to realize the collective goal of justice. Those who favor the indirect approach share the intuition that territorial rights realize collective values, such as the effective distribution of the benefits of cooperation. Perhaps Wellman's freedom of association theory is the closest to an indirect individualistic theory. He could argue that to realize the value of self-determination of a voluntary political association each individual needs to have property rights in resources and territory. This would be a difficult position to hold, given that associations that rely on non-territorial jurisdiction, like religious ones or the group of citizens of a nation that live abroad, may be said to have a right to self-determination, even if they do not express such right through the exclusive use and control of a territory.

Chapter Four - Direct Theories

1 Introduction

In this chapter I discuss direct theories of territorial rights. For direct theories, an agent acquires territorial jurisdiction because control over a territory in itself protects fundamental interest, such as happiness, self-determination, or individual self-government. Most direct theories make use of some theory of acquisition of property that explains how an agent comes to have robust titles to territorial jurisdiction. For this reason, most of the accounts examined in this section will face the challenge of offering a convincing account of original acquisition and just transfer. The only two exceptions are the utilitarian theory and the self-determination theory, which do not rely on a concept of property acquisition.

For the self-determination theory, a group acquires fundamental rights on a territory because it relies on it to pursue its right to self-determination, and because its members currently have a significant relation with it. The account of attachment proposed by the self-determination theory is not an historical one, nor does it rely on the idea of just transfers to explain how current occupiers came to have a title to territory.¹ The utilitarian theory also avoids the issue of original acquisition maintaining that the presence of a state within a territory is an arbitrary fact that has no normative implications, and that the state does not properly own a territory, but that it can only exert there political authority. Although the theory does not require a theory of property rights, it is the only direct theory that is not able to properly address the particularity requirement. In the next subsection, I will explain also why the utilitarian theory fails with regards to the issue of ethnocentrism and global justice.

Direct theories perform better than indirect ones with regards to both the *in rem* problem and the particularity requirement. For direct theories the title to territorial

¹ Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015), 40.

jurisdiction within a particular geographical location is justified on the basis of a relation of the group with the particular territory it occupies. For the collectivist theories, territorial jurisdiction in itself protects the groups' fundamental interest in self-determination or in its members' identity, and only the occupiers of that particular territory can demand territorial jurisdiction there. The collectivist theories for the most part are sensitive to community specific conception of territory and for this reason they are not subject to the charge of ethnocentrism, but I will show how they are liable of neglecting the demands of global justice.

For the individualist theories, control over territory protects individuals' interest in being self-governing. The individualist theories employ the self-government principle to ground both individuals' territorial jurisdictional powers and meta-jurisdictional powers. Both individualist accounts examined in this chapter perform well in addressing the challenge of ethnocentrism and the demands of global justice, as well as the particularity requirement and the *in rem* problem.

In particular, the individualist Lockean theory maintains that territorial rights are limited by the Lockean proviso. This allows the theory to restrict the scope of territorial rights to only those holdings that are necessary for individuals' sustenance and prosperity, and to the extent that acquisition does not limit significantly others' chances to acquire as much and as good. Similarly, the left libertarian theory relies on the proviso to limit territorial rights but interprets the proviso as an egalitarian requirement, according to which all individuals are due the same share of territorial rights. Both theories maintain that only those who occupy a particular territory can demand territorial jurisdiction there, and that the titles that individuals acquire are protected by claims and immunities against others' interference.

By the end of this section, I will suggest that although the individualist theories offer an interesting avenue for the resolution of the challenges faced by theories of territorial rights, they have problematic implications regarding our intuitions about territorial holdings and our current international practices. These complications will appear more striking when I will address the issue of secession in Chapter 7.

2 Statist Direct Theory

The statist direct theory suggests that only a state can acquire and enjoy territorial rights and that it can do so because a state's control of territory is in itself necessary for the protection of the citizens' fundamental interests in happiness and peace. This approach rests on the assumption that state-like institutions are in themselves necessary for the maintenance of peace and the protection of citizens' happiness, regardless of their compliance with some ideal of justice.

In the following section I examine the details of the utilitarian theory, which is the only statist direct approach. I show that it is also the only direct approach that fails to address the particularity requirement. In fact, Sidgwick justifies territorial rights using a functionalist argument, which focuses less on the importance of individuals' relation with a particular territory, and more on the goal achieved by according some territorial rights to their state.

2.1 *Utilitarian Theory*

For the utilitarian theory, only states may legitimately hold territorial rights. States, in this view, are a community of human beings that acknowledges permanent obedience to the same government.² Sidgwick argues that what distinguishes the state from other corporations is that its members believe that they belong to one another, and, if their political institutions were to disappear, they would “tend to hold firmly together.”³ The theory makes use of the functionality principle to hold that territorial rights are necessary for the state to perform as an effective political organization, protecting and ensuring its subjects' wellbeing. As long as this is true, states should be accorded robust territorial rights of the kind that they enjoy in international practice.

² Sidgwick, *The Elements of Politics*, 221.

³ Ibid., 224.

Differently from statist indirect theories, however, the moral ground of the legitimacy of territorial demands is directly justifiable with reference to its positive effects on the wellbeing of the community. The functionality principle, in this proposal, maintains that territorial rights protect the fundamental interest of individuals in peace and happiness. Additionally, Sidgwick notes that territorial entitlements are collective entitlements, and they are not reducible to any singular property title of the state's subjects. The title to territorial jurisdiction is thus acquired directly by the state on the basis of its role in securing the happiness of its subjects and preventing wrongdoing among them.⁴ Happiness in this view is intended as an aggregative concept, which refers to the wellbeing of the whole community.

Sidgwick argues that it is impossible to ensure that every subject of the state complies with the rules if the state doesn't have any control over its subjects' properties and over the space in which the subject resides.⁵ The citizens of a state with no control over its territory would be left with a state unable to ensure that the law is respected, and to secure peace. This is an intuition well received in indirect statist theories as well. However, Sidgwick relies on it to ground robust territorial rights without the requirement of political justice. This implies that almost any existing state may legitimately hold robust territorial jurisdiction and resource rights, as long as it is able to secure peace.

The utilitarian theory does not suffer from the *in rem* problem because for Sidgwick the state that currently relies on some territory for the effective protection of its subjects' wellbeing is the only agent that can legitimately hold territorial rights. Subnational groups, or foreigners, may not legitimately take control of the same territory, as long as that geographical area is subject to the territorial jurisdiction of a state that enforces some degree of peace.

On the other hand, the theory does not offer any explanation as to why the state may legitimately take control of the territory that its subjects occupy, and not, for instance of an uninhabited territory or any territory that is not already subject to a state. In fact, as long as it maintains peace and order within geographical borders, the state is

⁴ Ibid., 38.

⁵ Ibid., 222.

able to demand exclusive control of a territory. However, it is not important where the state is performing its functions and which territory it controls. If, for example, a group were to conquer a piece of land and quickly establish a sufficiently effective state, then the functionality principle would allow this belligerent group to have a right to that territory. It is unclear why the state may be able to acquire a particular resource rich territory, or a territory of strategic military importance, thus excluding others from the enjoyment of its resources and location.

Moreover, the utilitarian theory does not meet the challenge of explaining how territorial control was legitimate before a state had effectively established control of a geographical area. At the point in time in which a group takes control of a territory, until it has established a functioning state, the group does not hold a right to that particular territory, rendering its presence there at best disputable. As for the other theories, the functionality principle fails to offer a justification of the territorial title before actual control of that territory has been established, whether control over that territory is functional to legitimate political authority or to achieve peace and some protection of the rule of law.

The theory is also subject to the charge of ethnocentrism because communities that organize themselves as non state-like political units, such as indigenous tribes or religious associations, may not assert any legitimate title of territorial jurisdiction. This restricts the club of right-holders to a very particular type of political organization.

Moreover, states that effectively maintain peace and the rule of law acquire robust territorial rights of the kind that are currently protected by international practice. This leaves little space for the utilitarian theory to consider and address the demands of global justice, especially those that have not yet been recognized by international law. To better deal with the demands of global justice one could argue that the functionality principle should limit territorial titles only to those rights that are actually necessary for the pursuit of the collective good of peace and stability.

Sidgwick recognizes that territorial rights must be limited, but the conditions that he mentions do not sufficiently address global justice obligations. For Sidgwick, territorial rights are limited in three ways: first, if territorial holdings are no more

conductive to desirable consequences because of a change in conditions, then they must be abandoned. For example, Sidgwick argues that, in a period when piracy is a serious problem for the security of merchants, states are allowed to take control of the open sea. This is, however, an entitlement that is justified only in virtue of a specific danger that afflicts the state's subjects.⁶ Once the dangers of piracy are reduced, it is in fact desirable that the state's control retreats to the "narrow belt of water along the coast of a state's territory" to ensure the maximum degree of free right to "peaceful navigation."⁷

The second requirement is that the state must maintain a set of rules that is at least "not unjust" towards its subjects.⁸ Sidgwick suggests that the law is "not unjust" if it does not favor the interests of some at the expense of the interests of others on arbitrary grounds, and if it aims to the greater common good.⁹ It may seem that Sidgwick's account resembles an indirect theory. However, if the state is unjust it does not lose its claim to territorial jurisdiction, like in the case of indirect theories. If the state is outstandingly iniquitous it only loses control over the portion of territory or over the resources the control of which fosters instability and the unhappiness of its members.

Sidgwick in this regard offers the example of secession of cultural minorities: a group has a right to secede only if it can demonstrate "some unjust sacrifice or grossly incompetent management of their interests, or some persistent and harsh opposition to their legitimate desires."¹⁰ The division of a state in two smaller states has disrupting consequences both in the domestic sphere and in the international relations. Domestically, secession leads to discontent on the part of those who, until the seceding party was successful, considered the territory rightfully theirs. And in international relations the reduction of the size of the state results in the loss of strength and prestige of the original state. These are costs that a society should not have to bear unless in urgent and serious cases of oppression and injustice.

⁶ Ibid., 253.

⁷ Ibid.

⁸ Ibid., 39.

⁹ Ibid.

¹⁰ Ibid., 226.

The state, then, loses its territorial jurisdiction not because its institutions are unjust, but only if the injustice of its political institutions creates costs to peace and happiness that are higher than those incurred if subgroups were to secede. Injustice is thus not in itself the reason for the state's lack of territorial jurisdiction, but compliance with justice makes the political institutions more robust against threats of secession and revolution, and territorial titles more likely to maintain their validity as circumstances change.

Finally, the third limitation to territorial rights is that they must take into consideration also to the happiness of individuals who are not members of the state. Sidgwick suggests that with regards to the appropriation of land and resources, state's territorial holdings cannot be considered unlimited, but they must be subject to the same limitations that we would apply to the exclusive right of a private land owner.¹¹ State's holdings, thus, should be limited by considerations regarding "the general claims of humanity" to resources and ultimately to happiness, particularly when the territorial holdings of a state are already sufficient to the flourishing of its citizens.

These three requirements allow the utilitarian theory to offer a more nuanced theory of territorial rights, making some room for the demands of global justice. The space for global justice and the rights of subnational political and cultural groups is, however, significantly limited. Territorial rights in this account must merely make space for all individuals to participate in a community that protects their interest in peace. More extensive human rights play no role in limiting states' territorial holdings, which must be respected and which the state holds exclusively.

3 Collectivist Direct Theories

Collectivist direct theories maintain that groups, not only states, can legitimately demand territorial rights if they have established with the territory a special relation that is fundamental to their cultural or national identity, or to their right to self-

¹¹ Ibid., 255.

determination. I will examine two versions of the collectivist direct theory. The first, Miller's liberal nationalism theory, suggests that the acquisition of territorial rights from a community is akin to the acquisition of property from an individual. For this approach, the group acquires territorial rights if that particular territory is of primary importance to the identity of the group, and if the group has enriched the territory with material and symbolic value.

Moore's self-determination theory, on the other hand, maintains that a community acquires territorial holdings on the basis of the role that that particular geographical area has in the protection of the group's right to self-determination. Together with the self-determination theory, I discuss also Kolers' plenitude theory. The two proposals are very similar for what matters in my discussion. The difference between the theories regards the identification of the right-holder. For the plenitude theory, communities that can hold territorial rights share a common social ontology of the land and a distinctive pattern of use. Differently, Moore suggests that a group can hold territorial rights if it allows its members to pursue the political aim of collective self-determination. The two theories, however, share the same commitment to the value of self-determination, and they aim at respecting communities' narratives regarding their attachment to territories to the largest extent.

Because collectivist direct theories rely on the relation that a group has with a particular land, they are fit to address the particularity problem. For these theories, the group must have established a significant relation with a precise geographical area to legitimately exert territorial jurisdiction there. So for example, for the liberal nationalism theory, France may not legitimately exert territorial jurisdiction in Antarctica unless its people have worked on that land and have developed a relation with it that has shaped their identity. Similarly, for the self-determination theory, France must occupy Antarctica and demonstrate that territorial jurisdiction there is at the basis of its people's right to self-determination.

The direct collectivist theories are also able to respond to the *in rem* problem by suggesting that the significant relation with the land gives rise not only to property rights on the resources within their borders, but also to territorial jurisdiction there. Once the theory has identified the group that has established a significant relation with the territory, the theory can point us to the holder of both resource rights, and

territorial jurisdictional powers. As long as the theories do a good job in defining the right holder, then, they provide a conclusive argument in favor of the group's territorial jurisdiction and against existing competing jurisdictional powers.

Collectivist theories are particularly sympathetic to community-specific values, and they suggest that territorial holdings should for the most part be defined according to the demands of the group who has a significant relation with a particular land. Both versions of the theory take the challenge of ethnocentrism seriously and accord territorial rights on the basis of the group's specific values and narratives about territory. This, however, tilts the balance of considerations significantly in favor of the community's special interests, reducing the space for the demands of global justice. This implication could be mitigated applying a functionality principle to limit the scope of territorial holdings, but neither theory commits to such a strategy. The result is that groups acquire territorial rights that are as robust as their understanding of the role of territory for their identity or for their self-determination allows.

With regards to liberal nationalism and the plenitude theory, I also argue that their identification of the right holder is problematic. The former excludes many types of political groups from the club of the right holders, assuming that only national groups may offer the basis for individuals' identity. The plenitude theory instead offers two standards that may be at times in conflict and that make the identification of the right holder challenging. Finally, I argue that the liberal nationalism theory must also meet the challenge of offering a robust theory of original acquisition of property, given its reliance on a Lockean theory of collective property.

In the next three chapters, I develop my own proposal, which I call the Legitimacy Based Conventional theory of territorial rights (LBC). I place my account among the collectivist direct theories as it maintains that groups, not individuals or states, are the rightful holders of territorial rights. I share with the theories that I examine below both the direct strategy and the collectivist approach. However, to address the limitations of these theories I make use of a conventionalist theory of acquisition of territorial rights and of a functionality principle to limit the scope of territorial holdings. The result is a theory that does not suffer from the *in rem* problem, that sufficiently addresses the particularity requirement, and that does not need an account of original acquisition. In fact, LBC relies on a conventionalist theory of

territorial rights that for the most part favors the group that has a current significant relation with a particular territory, and that is not concerned on how the group has originally acquired territorial rights. Moreover, by making use of the functionality principle to limit the scope of territorial rights, LBC is sensitive to the wider commitment to principles of global justice and legitimacy. Even if territorial rights are defined and established on the basis of community specific values and practices, the theory is able to limit these titles to the role that they serve in pursuing the community's legitimate goals.

3.1 *Liberal Nationalism*

For the liberal nationalism theory groups acquire titles to territory if that specific territory is of primary importance to the identity of the members of the group, and if the group has mixed its labor to it and created material and symbolic value there.¹² Liberal nationalism considers national groups and their territorial holdings worthy of protection in virtue of the function they play in developing and protecting individuals' identity and, thus, also their wellbeing. Liberal nationalism is a direct theory because it considers the legitimacy of collective territorial rights as basic, and not dependent on any prior entitlement of political authority. However, only groups that present specific characteristics can be considered holders of territorial rights. First, the group must be an agent able to transform the territory in ways that are directly ascribable to its actions. Second, the group has to endure over time, and must be distinguishable from other groups even once its original members have disappeared. Miller suggests these to be characteristics shared by groups that are reasonably structured and whose members are strongly related by shared beliefs and practices, such as national groups, indigenous groups, and long-established churches.¹³

Nationality is one of the most important sources of individuals' identity, and for this reason it contributes to individuals' wellbeing. If a specific territory has been the

¹² Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), 97-123.

¹³ Miller, *Territorial Rights*, 13.

setting of events that have formed the historical national identity of a group, then this territory is likely to be perceived by the members of the national group as necessary to their identity. The analogy most used to exemplify this emotional and symbolic connection between members of a national group and their territory is that of the relationship between individuals and their parents.¹⁴ Once a significant relationship has been established, just like the natural relationship between father and son, then a natural desire to be close to the loved ones arises. In the same way, when a group of people establishes with its territory a meaningful relation based on important historical events, it is assumed that that group of people will consider that particular territory as their fatherland.

The symbolic link to the fatherland must be understood as objectively as possible. It is not sufficient, in fact, that a group of people just believes that a territory is significantly theirs. The link must be developed and retraceable to historical events that are objectively significant for the identity of the group. This historical and symbolic link is necessary but not sufficient to establish rights to territory. The group must also show that its identity depends in important ways on the use and control of the particular territory that it demands for itself.

The relationship a group establishes with its land must also represent the material effort that a national group has made to improve and change the territory in which it settled. Like the indirect collectivist Lockean theory, the liberal nationalist theory employs the collectivist version of Lockean principle of labor mixing according to which a group has a right to an external property if the value of the territory depends largely on the fact that the group has mixed its labor to it. The acquisition of territorial rights through the labor mixing principle is subject to a proviso.¹⁵ The right to formative territories could not, according to its proponents, justify the enlargement of the territory of a community much above the level needed for its members to meet basic needs,¹⁶ especially when other communities might lack the

¹⁴ Gans, *The Limits of Nationalism*, 110.

¹⁵ Locke suggests that the appropriation of land and resources cannot be legitimate if by appropriating one doesn't leave "as much and as good" for others. There is disagreement about whether the Lockean proviso refers to the limits of appropriation (strong interpretation of the proviso) or to the limits of use (weak interpretation of the proviso) of natural resources and land (Meisels, *Territorial Rights*, 79).

¹⁶ Gans, *The Limits of Nationalism*, 111.

means to achieve the satisfaction of their own members' basic needs. But because the proviso must be applied to both material and community specific symbolic value, it is unclear to what extent the symbolic value can be stretched to include the protection of more extensive features of the national group's identity, and against the group's duties of global justice.

The principle of mixing one's labor, moreover, cannot justify property in land when someone else rightfully owns the land that is being labored. In other words, it does not override legitimate entitlements that were in place before the new occupier started to enhance the land with his work. The principle of labor mixing, thus, works in conjunction with the idea of first acquisition and just transfer.¹⁷ This requires that the theory provides us with a robust account of original acquisition and just transfers. However, this can be particularly challenging given that it is difficult to identify the moment of original acquisition and all the subsequent transfers. Moreover, not many existing national groups can take pride in a history free from wrongful appropriation, and reliance on a theory of just acquisition and transfer may result in the rejection of many existing territorial holdings.

The labor mixing argument together with the formative territory argument constitutes the strongest case for territorial rights according to the liberal nationalist account. However, its proponents do not always wish to provide a conclusive set of arguments in favor of a group's right to territory. Instead, they suggest that the resolution of specific controversies about land and natural resources can only be achieved by taking into consideration every issue case by case.¹⁸ Thus, in addition to the labor mixing argument and the formative territory argument, liberal nationalism provides a set of considerations that should be addressed in the case of territorial disputes. Neither one of these factors carries decisive weight, but all show a concern for liberal ideals and for the protection of national identities that are necessary for individuals' wellbeing.

¹⁷ Waldron, *The Right to Private Property*, 176.

¹⁸ Meisels, *Territorial Rights*; Miller, *Territorial Rights*.

First, in deciding over territorial disputes one should consider who has first occupied the land.¹⁹ For liberal nationalism first occupancy is often considered one of those moments that constitutes a crucial link between the territory and the community. Moreover, the very first occupier of a land “did not have to disturb anyone else’s rights,” and any subsequent occupier, to be a rightful one, must get his title through voluntary transfer.²⁰ Second, liberal nationalists argue that some rights on land seem to be rightfully grounded on the mere fact that the agent is currently living in the land or that it has lived in it during a significant period of time in the past.

Moreover, Miller suggests that, although adding symbolic and material value gives a convincing moral justification to some groups’ territorial jurisdiction, these titles lose strength when competing with the simple fact of present occupation. First, the material and symbolic value that contributes to grounding the territorial right is likely to be stronger for the present occupiers, since they have added value to the land in more recent times, and are likely to be the ones that are relying on that land for their sustenance.²¹ The right of present occupiers rests on the fact that they are living their lives and making plans under the expectation that the place that they are currently occupying will be their homeland in the future. This argument echoes the occupancy principle, and it aims at protecting individuals’ ability to form life plans. Second, present occupation is the more important the more costly it is to reverting the territorial holding to a previous owner.²² Nevertheless, the strength of the demands

¹⁹ Gans, *The Limits of Nationalism*, 105; Hume, *A Treatise*, Book III, 2.3; Waldron, *The Right to Private Property*, 286.

²⁰ What Nozick calls “Justice in transfer.” Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), 150; Waldron, *Indigeneity?* 68.

²¹ Miller, *Territorial Rights*, 18; This is also supported by what Waldron calls the “supersession thesis.” The supersession thesis suggests that reverting the pattern of territorial holdings on the basis of historic injustice might be unjust itself. This could be so for two reasons: first, the right to territory is sensitive to the change in circumstances (Waldron, *Superseding Historic Injustice*, 16). So, “it is possible to imagine a pair of different circumstances, C_1 and C_2 , such that the entitlement can only barely be justified in C_1 and cannot be justified at all in C_2 ” (Ibid., 20). A reasonable defense of territorial rights must take into consideration the scarcity of the resource at issue and the size of the population. Thus, in circumstances less favorable the burden of justification of specific territorial rights might be heavier. The second reason has to do with the strength of the right itself that, according to Waldron, fades with time. The “intimacy” of the relation that a group establishes with a land may “evaporate” when a long time has passed since that group has enjoyed its title to that specific land. This is a limitation to the principle of mixing one’s labor, according to which once the link between the person and his labor fades away, the thing becomes embedded with that labor and regains independence from the laborer (Ibid., 17). If this is the case, the justification of past entitlements to land on the basis of historic injustice may be more challenging.

²² Jeremy Waldron, “Superseding Historic Injustice,” *Ethics* 103, no. 1 (1992): 16.

of the present occupiers does not exclude that historical claims may have to be addressed by restitution of territories.

Lastly, national liberalists appeal to the principle of self-determination and suggest that the right to a particular territory protects the group's interest in national self-determination.²³ According to Miller, for a national community to pursue its goals freely and successfully, it might need exclusive access to and control of a geographic area. In some cases, the community's self-determination may be inseparable from the group's territory.²⁴ For instance, if a community has the goal to become agriculturally self-sufficient, it is allowed to exert exclusive control over a specific geographical area, and to also controls who enters and resides in that area. Since agricultural self-sufficiency is a function of the amount of resources that a land can produce, and of the amount of people that consume those resources, it is necessary that a group might be able to exclusively control the flux of people in and out of its territory, and to regulate the use of land and resources.²⁵

None of these arguments represents a conclusive argument in favor of a particular right to territory. The labor mixing argument constitutes by far the strongest case for territorial rights; however, it is not sufficient. Other considerations must be addressed before territorial rights may be accorded, in particular when conflicts about shared territory arise. The theory does, however, favor national groups that have held a continuous significant relation with the land that was acquired through the mixing of their labor. But, the reliance on cultural homogeneity to identify a nation unduly restricts the club of right holders, and incurs the challenge of ethnocentrism. In fact, it favors national groups and fails to include other groups that may display similar attachment to territory, such as, for example, nations that are multicultural and are the product of a recent history of migration.²⁶

3.2 *Self-determination and Plenitude Theory*

²³ Miller, *Territorial Rights*, 264.

²⁴ Miller, *National Responsibility and Global Justice*, 151 and 214.

²⁵ Provided that the community respects the rights of refugees and people in dire straits (Ibid., 226).

²⁶ Moore, *Political Theory*, 80.

Moore's self-determination theory maintains that groups may legitimately hold territorial rights on the territory its members occupy if the group's control of that territory is fundamental to its right to self-determination. She argues that a group first acquires occupancy rights on the basis of its members' individual residency rights. Individuals acquire residency rights in virtue of the fact that their life plans rely on the occupation of a particular territory.²⁷ On the basis of their members' residency rights, groups acquire occupancy rights that amount to immunities from others' jurisdictional powers, and some incidents of territorial jurisdiction regarding the use and management of land and natural resources.²⁸

Occupancy rights are necessary but not sufficient to acquire full titles to territorial jurisdiction and resources.²⁹ Only groups subjectively defined as a people that have the capacity to exercise self-determination and have a history of cooperation together may legitimately exert full territorial jurisdiction. It may seem at this point that Moore is proposing an indirect theory, very much like the occupancy theory. However, for the self-determination theory, the lack of a capacity to exercise self-determination, or the lack of a history of political cooperation together, does not constitute a "blocking condition" that would make the group unfit to hold territorial jurisdiction. These requirements merely offer guidelines for the "judgment about the possession of qualities or characteristics that the group ought to have."³⁰

It is unclear to what extent these requirements affect the group's rights of territorial jurisdiction and resources. Moore argues that the lack of political capacity of the group to effectively carry on some collective action, or the lack of resources and extreme property, do not make the group's territorial jurisdiction illegitimate but only somewhat weaker.³¹ What seems to be more important for the group's worthiness of territorial jurisdiction is the history of cooperation that its members share. Even in this case, however, the history of cooperation must not be one of a glorious past as a state or a nation. As long as a group is able to demonstrate that its members have

²⁷ Moore, *Political Theory*, 37-39. These rights are akin to the occupancy rights described in the occupancy theory.

²⁸ Ibid., 40, 44.

²⁹ Ibid., 45.

³⁰ Ibid., 51.

³¹ Ibid., 52.

had significant relationships with each other in the past, and not only a transitory aspiration for independence, the group should be accorded some title to territorial jurisdiction.³²

For the self-determination theory, the group acquires territorial rights on the basis of its community specific values regardless of its political ability.³³ The group's right to self-determination grants territorial jurisdiction and resource rights on the basis of the community's understanding of what it means to be self-determining.³⁴ This makes the theory well suited to avoid the charges of ethnocentrism. However, the balance of considerations is heavily shifted in favor of the community's special interests and gives little space for the demands of global justice. Even if Moore were to set a limiting functionality principle according to which territorial rights were as extensive as needed for the group to exercise self-determination, the limitation would refer to what self-determination means for the community itself, and thus still favor the community's special interests in the territory. The only limitation to the enjoyment of full territorial and resource rights that the self-determination theory proposes are the claims and immunities that others have in virtue of a minimal right of subsistence.

Because communities hold territorial rights on the basis of their specific understanding of what it means to be self-determining, diverse groups' rights to self-determination may justify conflicting titles to territorial jurisdiction and resources. In this instance, Moore suggests that if the parties in conflict have a long history of cooperation, they will have reciprocal duties to achieve a mutually beneficial agreement, but only if the history of cooperation is one that was beneficial to both.³⁵ If no history of beneficial cooperation can be recollected, Moore argues that the groups are not permitted to violate each other's right to self-determination. But given that the community's special understanding of self-determination sets the scope of its territorial titles, the theory leaves undetermined the guidelines for the resolution of conflicts that arise from competing ideas of self-determination, even with regards to communities that are not present in the territory at issue. For example, imagine that

³² Ibid., 57, 60.

³³ Ibid., 72.

³⁴ Ibid., 66, 166.

³⁵ Ibid., 129-134.

the island of Kiribati disappears prematurely due to rising oceans, and imagine that Tonga has the resources to incorporate Kiribati's population, which is willing to join the Polynesian community. Moreover, imagine that according to the people of Kiribati, joining any other community aside from the Tonga would endanger their right to self-determination, as it would force them to change their ways of life too dramatically. However, imagine also that the people from Tonga are not similarly open to the idea of sharing their resource rights and their territorial jurisdiction with their neighbors in need because they feel that the integration between the two different cultures would slowly erode their cultural uniqueness.

In this case, the two groups' right to self-determination are in contrast, as the refusal of the people from Tonga to share their territorial rights with Kiribati violates Kiribati's self-determination rights, given that Kiribati sees no other option to preserve their self-determination besides joining forces with Tonga. Moore gives us little as guidance to determine whether Kiribati has a freedom to pursue its rights to self-determination regardless and migrate to Tonga, or if this should be a case where Kiribati has simply lost the ability to pursue its rights to self-determination. In fact, they have no occupancy rights in the island of Tonga, and given that the two groups have no relevant history of cooperation, the people of Tonga have no obligations towards Kiribati to share their territorial holdings, besides some duties to ensure their survival.

Finally, Moore's proposal has the further limitation that it cannot be used to address rights on unoccupied resources. She argues that disputes regarding unoccupied resources should be addressed as property disputes. For these cases, Moore at times offers solutions based on existing international practice and law, or based on a Lockean theory of original appropriation, or based on principled arguments such as the tragedy of the commons.³⁶ In so far as Moore relies on a theory of property acquisition, the theory incurs the difficulty of providing a robust theory of property and just transferal.

Similar problems afflict the plenitude theory. According to Kolers, a group acquires territorial rights if its members share a conception of land and resources that identify

³⁶ Ibid., 167-173.

the particular territory of importance to the group, the reasons why that particular territory is important, and the principles and methods according to which it can be used and managed.³⁷ The group must also be effectively using the territory its members occupy, have used it in the past, and have the intention to use it in the future to assert territorial jurisdiction there.³⁸

Kolers argues that it is important to ensure that our understanding of resources and territory respects the community's social ontology and use patterns.³⁹ With respect to Moore's proposal, however, the plenitude theory has the added complication that it accords significantly more robust territorial rights to groups, reducing considerably the role of considerations on global justice in determining the nature and extent of territorial holdings.⁴⁰ Moreover, as Moore points out, the plenitude theory also fails to offer a clear account of the rights holder. Kolers assumes that the two criteria of social ontology and land use patterns will always point at the same right holder, while in fact they may conflict.⁴¹ For example, if we concentrate on land ontology we may find Quebecois understand their land as the location of their defeat in their history of resistance against an English political and cultural project. However, if we concentrate on the pattern of use, we may find that the Quebecois' use of their land is no different from that of their fellow Canadians.⁴² The confusion between the two standards makes it problematic to identify the holder of territorial jurisdiction.

4 Individualist Direct Theories

The individualist direct theory maintains that individuals, and not only collective agents, can legitimately demand territorial rights if they have acquired a title of property on that particular piece of land. For these theories, individuals acquire property in land if they have mixed their labor with it. By mixing their labor, individuals have established with the territory a special relation that is fundamental to

³⁷ Kolers, *Land, Conflict, and Justice*, 3-4.

³⁸ Kolers speaks in this regard of 'plenitude' (Ibid, 111-120).

³⁹ Ibid., 86-87.

⁴⁰ Armstrong, *Resources, Rights and Global Justice*, 221.

⁴¹ Moore, *Political Theory*, 74.

⁴² Ibid.

their interest in self-government. For both versions of the individualist direct theory, groups and states may acquire territorial rights only if their members transfer their titles to political institutions via means of consent.

The two versions of the individualist direct theory are Simmons' individualist Lockean theory and Steiner's left libertarian theory. Both suggest that individuals' acquisition of property must be limited by the Lockean proviso. However, Simmons argues that the proviso must be understood as a sufficientarian limitation, according to which when one appropriates land one must leave enough and as good for others to appropriate as well. Steiner, on the contrary, interprets the proviso as an egalitarian limitation to appropriation, according to which every individual must be able to appropriate the same amount and value of territory and resources. This leads Steiner to support the establishment of a global fund that ensures that the value of all existing and usable resources is equally distributed among each individual globally.

Because individualist direct theories ground territorial rights on individuals' property entitlements to a particular land, they offer a conclusive justification both of who can exert territorial jurisdiction somewhere and of the title to the particular territory that the agent occupies. For these theories, a state may not control an uninhabited land like Antarctica, unless that particular area is in some relevant way owned by its members: they must have mixed their labor with it, and their ownership must protect their fundamental interest in individual self-government. Individualist theories are also suited to address the demands of global justice. The appropriation of private property is in fact limited by the extent to which property is needed to pursue individual's interest in self-government. The theories are less concerned with the protection of group rights, as long as individuals have a genuine opportunity to be self-governing.

The reliance on a theory of property rights, however, makes the individualist theory subject to the charges of ethnocentrism. I will argue that the charges are weightier for Steiner, given that his theory considers resources and territory valuable only from a free market perspective. Simmons, on the other hand, argues that individuals have discretion on what kind of attachment they develop with their territory and values, and thus, also on what territorial rights their voluntary associations hold. By relying

on property acquisition, both theories must propose a convincing account of original acquisition and just transfer.

Finally, as I argue in more detail in Chapter 7, individualist theories unconvincingly promote a theory of secession that allows individuals to secede separately from each other. Although individualist theories propose a theoretically sound theory of territorial rights, the resulting account of territorial rights sits problematically with our intuitions that territorial rights protect values that are collective and relational, as well as of our practice in international relations. Their rejection of fundamental collectivist titles to land makes them unfit to address properly the question of what territorial rights do states and group have, without depending on a unrealistic and unfeasible aggregative account of territorial rights that falls short of our intuitions.

In the following section and in Chapter 7, I also argue that Simmons' attempts at reconciling the individualist approach with our intuition regarding the collective nature of territorial rights show that there is room for the individualist theory to come nearer a more probable and feasible theory of territorial rights. However, the reliance on a concept of individual private property is an important limitation of his proposal.

4.1 *Individualist Lockean Theory*

The individualist Lockean theory accords territorial entitlements to individuals on the basis of their faculty to acquire property rights in land. According to Locke, property entitlements can be acquired prior to the establishment of political institutions that enact and enforce them. The theory employs the principle of labor mixing and the principle of individual self-government to explain and justify individuals' territorial rights.

Individuals can acquire unowned property if they add material value to it, and thus if they add some element of themselves to the object of their choice. An individual can add value to an object by working on it and creating new products out of it (if it is land, a man can cultivate it or build shelter on it) or making it usable for

consumption (if it is a fruit, a man can pick it up and peel it). The object thus modified becomes property of the individual who invested his time and effort in changing the object. By putting his time and effort in the object, the individual has put some of himself in it.⁴³ The object is now infused with the material presence of the man. Since every individual has an entitlement to self-ownership,⁴⁴ they also have an entitlement on whatever they mix their labor with. By transferring some of themselves into the object of their choice they acquire property over it.

Once this transformation has taken place, the object that the individual has chosen becomes different from the land and the objects that were originally held in common.⁴⁵ Locke's right to property is not only natural but also does not require the consent of others to be justified.⁴⁶ However, for acquisition to be a justified imposition of duties on others, it must be limited. Acquisition is justified if limited by a proviso, which holds that the agent who acquires an object or a piece of land must leave as much and as good for others to acquire.⁴⁷ This limitation ensures that all individuals are able to pursue their own preservation and prosperity independently by exercising their fundamental right to self-government.

The individualist Lockean theory also subscribes to the efficiency principle. When the land is used in a way that it produces more of those products that are beneficial to men, then it is efficiently used. The more efficient the use of a land is, the better it is for the preservation of humanity. As already explained in the section on the collectivist Lockean theory, efficiency is an important measure of the validity of property holdings. However, it is not to be considered a maximizing principle, but only as a weighty factor in the determination of competing demands.

The promotion of the value of efficiency and of a theory of individual property rights makes Simmons' proposal subject to the charge of ethnocentrism. Only voluntary communities that understand their members' relation to land as one of individual ownership and efficient use are regarded as worthy of territorial holdings.

⁴³ Locke, *Two Treatises*, II, 25; Simmons, *The Lockean Theory of Rights*, 238.

⁴⁴ Waldron suggests that the argument for self-ownership should be intended as an argument for a title of individuals to their bodies and their energies. (Waldron, *The Right to Private Property*, 183).

⁴⁵ Locke, *Two Treatises*, II, 27.

⁴⁶ Simmons, *The Lockean Theory of Rights*, 224.

⁴⁷ *Ibid.*, 281.

The charge of ethnocentrism is mitigated by the fact that individuals are free to form any association they wish to join. Nevertheless, many existing communities that we may consider worthy of legitimate control and use of land and resources are not the result of individuals that have come together freely and voluntarily. For example, consider the Amish communities. These are neither voluntary, nor they are based on a conception of property that is individual. However, it would be difficult to reconcile that communities of this kind do not deserve some control on the territory that their members use for their self-preservation and prosperity.

The individualist theory relies considerably on a theory of property acquisition to identify the right holder and the particular territory that the right holder has acquired. This allows the theory to address the *in rem* problem and the particularity requirement, given that the individual who acquires property rights on the particular territory that is unowned and with which he has mixed his own labor, also acquires territorial jurisdiction and meta-jurisdiction there. However, reliance on a theory of appropriation makes it difficult for the theory to address and explain existing territorial holdings, given that proving that current holdings are the result of legitimate original acquisition and transfer is a challenging undertaking.

Simmons suggests that even if actual holdings will never fully satisfy the requirements of the moral theory that explains them, they can still be assessed according to how well they approximate the moral requirement of an ideal theory.⁴⁸ I believe this to be a sensible perspective on the problem of original acquisition. Yet, if the theory of property acquisition is only an evaluative tool, the theory is ultimately unable to tell us whose title we must evaluate. If we cannot rely on an account of original acquisition to determine who is the rightful owner of a territory, then it is unclear whose title we should consider when assessing whether it fits with the moral requirement of the theory of acquisition. Should we give priority to existing titles? If so, why? If the original appropriation theory is to be understood as a guideline, then Simmons must also explain whether there is another principle according to which we must justify existing holdings or give way to alternative and revisionist territorial demands.

⁴⁸ Simmons, *On the Territorial Rights of States*, 315.

Because the function is that of protecting the basis for individuals' self-government, the scope of territorial holdings cannot extend much further the scope of the property holdings of its members.⁴⁹ This implies that many territorial holding, such as for example the deep seas and un-inhabited lands, cannot be considered legitimately held by any institution, and that they are still areas subject to the principle of original acquisition and the limits set by the Lockean proviso. Simmons' idea that rights to uninhabited and unused territories are hardly legitimate is in some ways appealing, even if it is in sharp contrast with our present practices in international law. The proposal is favorable to those who have not acquired enough and as good to establish new property rights on unused land and resources, and to pursue their right to self-government. The theory is thus sympathetic to the demands of the global poor, and accords very limited rights to existing political institutions.

For Simmons, once individuals have acquired property rights on a territory on the basis of their right to self-government, they may voluntarily transfer their titles to political institutions that allow them to pursue the satisfaction of their more complex needs. The individuals' consent, being vague and inexplicit,⁵⁰ leaves open the question of to what extent the state acquires powers to control and exploit a territory and its resources. For this view, a state acquires any territorial rights that is necessary to achieve the end for which men decided to establish political institutions, which for Simmons is the enforcement of individuals' natural rights to property and the adjudication between controversies in order to protect a peaceful and stable society.⁵¹

Fernando Tesón proposes a version of the Lockean individualist theory and suggests that the state acquires additional land and resources so that it is able to provide "genuine public goods".⁵² Tesón suggests that the notion of public good includes less than it is currently considered as such. Nevertheless, it is reasonable to believe that the concept of public good is more extensive than the enforcement and adjudication of individuals' natural rights to property, which are limited to what they can acquire in nature, provided that they leave enough and as good for others. The individualist Lockean theory, thus, employs a version of the functionality principle to justify

⁴⁹ Ibid., 317.

⁵⁰ Simmons, *The Lockean Theory of Rights*, 312.

⁵¹ Ibid., 313-317; Locke, *Two Treatises*, II, 99.

⁵² Fernando Tesón, "The Mystery of Territory" *Social Philosophy & Policy*, 32:1, 2015, 35

control of public land, according to which a state can legitimately demand exclusive control of territory if it is necessary to perform its minimal functions.

The theory makes use of the functionality principle to justify territorial rights that extend past individuals' holding and "independent of any common consent," such as territorial jurisdiction over public spaces necessary for shared activities, recreation, and gathering.⁵³ States' territorial rights are thus not a simple aggregation of individual legitimate entitlement to land and property. Rather, individuals together transfer their territorial titles to political associations that, subsequently, acquire titles on more extensive areas that become public land, on and all the shared territory needed for institutions to effectively perform the functions for which they were created. In this way, Simmons attempts to reconcile the individualist approach and our intuitions that territorial rights are in some important sense collective entitlements.

At this point it is important to clarify one aspect of the individualist theory that, I believe, puts a strain on Simmons' proposal. For the individualist Lockean theory, individuals transfer their territorial rights to the political institutions of their choice. Even if transferred to political institutions, territorial rights remain subject to the consent of the state's subjects. Individuals retain the right to disentangle from institutions that they do not accept anymore and the right to take their property with them. I discuss the problem of individual secession in Chapter 7. However, it is important to anticipate another problematic aspect of considering territorial rights as individual entitlements.

Simmons' concession that territorial rights must in some sense include also titles to public and unowned land complicates the neat picture that the Lockean theory of property acquisition promotes. Simmons' proposal relies on individuals' property rights for the most part, but then it also advances the idea that some territorial rights may emerge independently and above individuals' territorial holdings. These collective titles to public land and shared spaces emerge from a principle of functionality that protects the correct functioning of political institutions aimed at protecting people's interest in self-government. This is problematic in two ways.

⁵³ Simmons, *On the Territorial Rights of States*, 314; Tesón, *The Mystery of Territory*, p. 36.

First, it is now unclear which rights take precedence over the others, whether those of the state or those of its separate members in case, for example, of secession. In fact, it is unclear to what extent the functionality principle can be used to justify territorial rights that go past the individual property holdings that are aggregated, and what happens to these titles once individuals secede independently from their neighbors. Consider also that there may be cases in which the protection of the effective functions of a state may be in sharp contrast with the rights of one or more members of society to secede. In this case, does the individuals' interest in self-government defeat the interest of the remaining members of society in maintaining functioning political institutions?

Simmons mentions that dissenters surrounded by consenters' land may have an incentive to swap their property together with other members of society, and gradually drift away from the core of the original community, to create an area populated by dissenters.⁵⁴ However, he does not deny that the dissenter has a right to separate independently from the other members, and disregard the incentive of joining other dissenters.

Differently, Tesón argues that in most cases individual secession “may be wrong.” He suggests that individual secession will upset the agreement between property owners, and that the government has powers to prevent any action that will gravely harm others, like war and natural disasters.⁵⁵ However, Tesón's solution is in contrast with the individualist foundation of the individualist Lockean theory. War or natural disasters are external menaces to the community; on the contrary, the government's legitimacy is challenged from the inside in the case of the individual dissenter. The dissenter disagrees with the other members of society on whether political authority should be accorded to the government, and wishes to exercise his or her meta-jurisdictional authority separately, by entrusting other agents with territorial jurisdiction. In this case, the disagreement is precisely about the role of that particular government as a legislator, enforcer, and adjudicator. Thus, if individuals may legitimately exert meta-jurisdictional powers separately from each other, the government does not have powers to prevent the dissenter's secession, given that it

⁵⁴ Simmons, *On the Territorial Rights of States*, p. 314.

⁵⁵ Tesón, *The Mystery of Territory*, pp. 46-47.

would lack the authorization to enforce its decisions on him. In the case of the dissenter, the government may not adjudicate on whether the dissenter's actions endanger the political community, because it may not adjudicate on matters regarding its own legitimacy. To maintain that the government can oppose individual secession, Tesón must concede that the meta-jurisdictional powers of the rest of the state's members prevail over those of the individual dissenter.

Second, it is also unclear on what basis the state should hold territorial rights that are more extensive than those of its members, when its members' property rights already protect their rights to self-government and their chances for prosperity. If a state can only acquire what is needed for its members' rights to self-government and prosperity, it should hold only those rights that individuals acquired in the state of nature, and that were subsequently transferred to political institutions. Those are the only rights that are necessary to the protection of their fundamental interest in self-government. Any right acquired above the property holdings sufficient for preservation will contribute instead to the chances that individuals have to prosper and better their situation.

The functionality principle comes in play in the individualist Lockean theory to establish territorial rights on public spaces, and to address the idea that property entitlements must in some ways be linked to each other in a territorially dense and continuous system of rights.⁵⁶ The functionality principle, thus, protects both individuals' chances to self-government, and the interest that these people have in being members of a network of normative relations that is functional to enrich their chances for prosperity. If this is so, then on what basis may a state assert rights to public spaces but not also on uninhabited and unused land? To what extent should individuals' interest in the benefits of their cooperation be protected, and to what extent instead should their demands to territories that are not included in their basic right to self-government be rejected?

⁵⁶ Cara Nine, "Territory is Not Derived from Property: A Response to Steiner," *Political Studies* 56 (2008): 960.

4.2 *Left Libertarian Theory*

The left libertarian theory proposed by Steiner is in large part similar to Simmons' proposal, as it also suggests that individuals acquire property rights on particular territories through the labor mixing principle. Once they have acquired titles to a territory, individuals may freely transfer those rights to the political associations of their choice. Thus, a state acquires territorial rights if all its members have consented to its institutions and have transferred to them their property rights on territory and resources.

An important difference with the Individualist Lockean theory is that for Steiner the Lockean proviso must be understood as an egalitarian limitation to original acquisition, granting a universal right to equal freedom and a claim that protects individuals from others' interfering with their title to an equal share of territory and resources. In fact, for an individual to be free to do something, Steiner argues, he must own every physical space and object that that action requires.⁵⁷ So for example, I am free to open the door of a locked room if I can walk from my location to the door without anyone obstructing me, and if I have in my possession the keys of the door. This very simple example shows the physical nature that rights have in Steiner's conception of freedom. The physical conception of freedom coupled with the idea that individuals hold a right to equal freedom sets the basis for Steiner's theory of territorial rights.

Since individuals have a right to act equally free in the external world, and since every action requires the possession of the physical objects on which the action impinges, it follows that every individual has a right to an equal share of physical possessions, including territorial holdings.⁵⁸ Steiner argues that the basis for calculating each individual's share of resources is the amount of resources that were originally unowned and thus the existing resources minus the added value of labor.⁵⁹ As the current territorial holdings represent an unjust distribution of rights, the theory

⁵⁷ Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994); Ian Carter, *A Measure of Freedom* (Oxford: Oxford University Press, 1999).

⁵⁸ Steiner, *Territorial Justice*, 32.

⁵⁹ Ibid.

requires that a global system of redistribution should be implemented that ensures that each person accesses the resources and territory to which he or she is entitled.⁶⁰

Every title not originally acquired by taking into consideration the rights of others to an equal share of natural resources, or – if already owned – that is not voluntarily transferred, is due to the legitimate owners. The legitimate owner, in the case of original over-appropriation, is the under-appropriator, in other words, the person who owns a smaller share of what should be legitimately hers. In the case of already owned land, instead, the legitimate holder is the one who owned the land a moment before the chain of legitimate entitlements was broken.⁶¹ Because relocation is costly and inconvenient, however, the global fund will distribute resources on the basis of their market value, and the rightful owner will receive compensation on the basis of what he or she has lost due to over-appropriation or illegitimate transfer.

Like Simmons', Steiner's proposal offers a solution to the *in rem* and the particularity problem. For the left libertarian theory, in fact, individuals acquire property titles on the land that they occupy and with which they mix their own labor. The territorial rights thus acquired also include territorial jurisdiction. In this view, only the people who have acquired territorial rights within a particular territory may exert territorial jurisdiction there, and only within the borders of the property that they have legitimately acquired.

The theory is committed to addressing the demands of global justice, suggesting that territorial rights and resource rights should be distributed equally globally. Steiner recognizes that the redistribution of actual territorial holdings would require displacement and the disruption of existing life plans. However, he argues, if we evaluate the common pot of resources before the added value of labor on the basis of its market value, we are able to tax the over-appropriators in favor of the under-appropriators. I wish to point out two difficulties with this view.

First, the focus on the market value of natural resources and territory dismisses alternative ways to understand territory that are not easily quantifiable. Different people consider territory important not as an item to exchange with others for

⁶⁰ Steiner, *An Essay on Rights*, 266-282; Steiner, *Territorial Justice*, 37.

⁶¹ Steiner, *An Essay on Rights*, 268.

money, nor as an object of material value, but as a significant part of their identity and meaningful relations with others. In this regard, Steiner would say that the value of some resource or territory could always be reconciled with the monetary value that others attach to it. However, the very fact of monetizing territory and land may lead some communities to reject any attempt to bargain and compromise. The exchange for money of something that they consider holy, for example, may deeply offend their sentiments towards the contended territory and create friction and resentment against those who advance competing claims. Although the theory is chiefly concerned with the demands of global justice, its focus on market value and exchange may undermine its aims making communication between deeply different societies and international relations harder.

A second issue with the global fund idea resides in the very possibility of evaluating the common pot of resources. Things and territories become resources according to what people think and do with them. For example, before we were able to refine oil and make products out of it, oil was a resource of no value. Similarly, before we had the technology to venture to Antarctica, the region was of no importance for us. The radical change of the value of these resources at the time of discovery, and because of the way we make use of them, makes it very difficult to determine whether the resource is valuable in itself, or because of the labor, expectations, and innovation that people put into it. Did the first man who acquired and used oil create all the value that oil has today, or did oil always have the value that it has today? And if, as it is more reasonable to believe, it is neither one of these options alone, what is the ratio between added value and original value?

These complications show how important it is for the left libertarian theory to offer a solid theory of original acquisition and of value. The theory must be able to address some of the most complicated concerns we are going to face in the not so distant future, when for example resources found in space will be accessible to some but not all of the countries or individuals on Earth. These are not easy calculations to make, even if we accept that the value of resources and territory should be the value determined by the market.

Finally, the left libertarian theory shares with the individualist Lockean theory the idea that territorial rights must be understood as individual titles to land and

resources, and that states acquire territorial rights if individuals voluntarily transfer their titles to states' institutions.⁶² Differently from Simmons, however, Steiner does not make any concessions regarding the rights of states on public space. According to his view, states hold territorial rights only on those areas in which their members have property titles. Thus, states' territorial rights are a mere aggregate of individuals' property holdings. This makes it easier for Steiner to show how separate individuals may be able to secede from their institutions and take their property with them, without the difficulty to discern between states' independent holdings and their members' territorial rights. However, the resulting theory is one that is difficult to accept. Steiner asks us to imagine a state that has no legitimate powers on the publicly held territory that links its members' property. For Steiner, the state may also be interrupted by many independent mini-states resulting from individual secession. But a state that does not maintain a locally dense and politically stable territory is not a state in the common sense, and may not be able to perform important functions such as making and enforcing laws and securing peace.⁶³

5 Conclusions

In this and the previous chapter I have argued that direct theories must be preferred to the indirect approach to territorial rights on the grounds of their ability to address the particularity requirement and the *in rem* problem. With some exceptions, indirect theories fail to indicate a unique holder of powers of territorial jurisdiction and to explain why an agent has a right to a particular territory. For the most part, this flaw has to do with the central role of the principle of functionality in indirect accounts and the focus on a performance based account of attachment.

Direct theories avoid the *in rem* problem and sufficiently address the particularity requirement by offering an account of attachment to a particular territory that is not based on the agent's ability to give a particular institutional performance, and that

⁶² Steiner, *Territorial Justice*, 34

⁶³ Nine, *Territory is not Derived from Property*, 961.

grounds the agent's title to territorial jurisdiction there. However, to justify territorial jurisdiction, they often rely on a theory of original acquisition and just transfer. I have discussed some of the difficulties in developing such theory with regards to territorial holdings. These have to do with the fact that it is often very difficult to retrace the history of current territorial holdings and the value that original appropriators have added to their legitimate holdings. Moreover, their focus on the agent's specific values in the determination of territorial holdings makes direct theories often neglectful of the demands of global justice, in particular if they are also collectivist theories. Nevertheless, I have suggested that the faults of the direct approach can be rectified without compromising the advantage that it has in addressing the *in rem* problem and the particularity requirement. In particular, direct theories can apply proper limitations to territorial rights by using a proviso or the functionality principle.

I also argued that the collectivist direct approach should be preferred to the statist and individualist ones. Differently from the statist view, the collectivist approach is not ethnocentric. It also avoids the difficulties associated with the individualist approach with regards to secession and the control of public space. The biggest flaw of the collectivist direct account is that it tends to tilt the balance of considerations in favor of the groups that acquire territorial rights, reducing the space for considerations of global justice.

A problematic balance between community specific values and global values may spur conflict and exacerbate the differences between groups, possibly hindering international cooperation. A theory that gives too central of a role to community specific values in defining territorial rights may encounter opposition from outsiders that may find the community's demands overly self-regarding. On the other hand, a theory that gives a central role to one's obligations to the global community may induce resentment from those who rely on the enjoyment of particular resources and hinder communication and debate regarding shared global obligations.

In the following chapter, I develop my proposal. LBC is a collectivist direct theory of territorial rights that relies on a conventionalist theory of territorial rights that protects individuals' interest in self-government. Because individuals need a stable relation with the territory in which they organize their lives, they acquire some titles

to occupy, use, and control that particular territory. The conventionalist theory does not rely on a theory of original acquisition, but focuses its concerns on the present and active interests of current occupiers, favoring for the most part the group that has an existing significant relation with a particular territory.

LBC also addresses the problem of balancing community specific values and global obligations, by employing a version of the functionality principle to limit the scope of exclusive territorial rights to only what is necessary for the protection of a set of requirements of legitimacy. I explain in Chapter 6 that legitimacy is a composite concept and may be met in different ways, respecting the different systems of values that communities use to determine their territorial holdings. For this view, although communities hold territorial jurisdiction for the mere fact that they rely on a particular territory for the protection of their members' self-government, they acquire an immunity against others' territorial jurisdiction within the same borders only if they meet the requirements of legitimacy, and only to the extent that they do so. This allows LBC to leave ample space to the demands of global justice, maintaining an approach that still favors a community's specific systems of values.

In developing my proposal, I also address a set of other concerns that I think a theory of territorial rights should address. A theory of territorial rights need not only be theoretically compelling, but also it must take seriously the effect that territorial control, occupation, and the exploitation of resources have on the lives of individuals, and offer realistic and sustainable solution to territorial disputes. These considerations appear in almost all the proposals that I have examined. In fact, the occupancy principle and the occupancy rights proposed by most of the existing literature are meant precisely to ensure that the first beneficiaries of our moral theory of territorial rights are individuals and their current expectations to lead their lives according to what they consider important. However, the protection of individuals' interest in being self-governing, and the sustainability of the resolution of conflicts play a substantial role in LBC, which aims at addressing the widest range of actors that is possible, without compromising our commitment to fairness.

Chapter Five - Conventions

1 Introduction

Different communities often rely on the same territories for the protection of their ways of living, their values and traditions, and their members' fundamental rights. A community's assertion of their title to a land is often grounded in what their members believe to be a truth about their interests and attachment to that particular land. When two or more groups believe in incompatible narratives about their attachment to the same territory, conflicts are bound to appear and disrupt significantly the lives of their members.

Conflicts over lands and resources have direct consequences on people's livelihoods, in particular on those who inhabit the contested territories or whose lives depend on the enjoyment of contested resources. The conflict in Cyprus between Turkish and Greek Cypriots is an example of how interests on controlling a strategically important territory for Turkey, Russia, the UK, and Greece has affected the lives of those inhabiting the island. Among other reasons, the location of the island is of military interest for the UK and western European countries because of the influence that Russia may be able to exert on the Mediterranean Sea were it to settle a military base there. Moreover, recently significant amounts of offshore natural gas have been discovered, and this has increased the international interest for the island, which is still divided between the *de facto* control of Turkey in North Cyprus and the independent government of the South that has cultural and political ties to Greece.

The complex network of political and economic interests has developed into a human rights crisis for the people inhabiting the island, with the two sides harboring resentment for each other. One among the many disrupting effects that these conflicts have had was the expropriation of Northern Cypriots' houses and their relocation to the south of the island, following the Greek coup and the Turkish invasion in 1974. Since then, many people have lost their houses and received nominal compensation, which for many families meant losing a lifetime's worth of savings and the principal means of livelihood. They have also in many cases lost

contacts with their family members that had not undergone displacement, losing touch with the social fabric that gave meaning to their interpersonal relations. The Cypriot case is not a singularity in today's international relations, where large-scale political programs and the associated interests in international security and nations' prosperity at best ignore the most fundamental interests of those affected.

As the example of Cyprus tells us, territorial disputes often have to do with the most fundamental interests of persons, their livelihoods, and the frameworks for meaningful interpersonal relations. However, one also needs to consider who else is affected and to what degree by the dispute, and thus who should be considered an interested party. I believe parties that should be granted some say in the determination of territorial rights are all those groups and individuals that have an existing interest in the territory, the satisfaction of which may not be attained with the control or use of any other territory or resource than the one currently contested. The agents affected may be those risking their livelihoods, but also those who have an interest in less urgent means for wellbeing, such as the exploitation of a natural resource for the prosperity of a nation. A theory of territorial rights should offer a way to accord different territorial rights on the basis of these different, important, and sometimes conflicting interests.

Conventionalist theories of rights are a way one can identify these overlapping and diverse entitlements. According to this view, persons have a right to a particular land when this right is specified by a convention. Conventions are regularities in behavior of a group of individuals that are faced with recurrent situations. When a group is presented with a problem of cooperation, its members will spontaneously settle for some arrangement that is in some ways readily accessible.¹ The origin of this idea can be found in Hume's thought, who saw in the concept of interest a powerful tool to explain the emergence of social cooperation. Hume's intuition is that individuals behave in accordance with their personal goals and interests, and that they spontaneously bargain towards some type of arrangement that they all prefer over continuous conflict and violence.

In this chapter I show that the appealing features of the conventionalist approach are

¹ Assuming that cooperation is preferred to the cost of continuous conflict.

fit to tackle the particular issues emerging from territorial disputes. In particular, the focus on persons' interests emphasizes the reasons behind conflicts on territory and the possible avenues for resolution through compromise between interested parties. If individuals can assess their ambitions and desires as possible objects of negotiation, then they may be able to arrive at an agreement that can benefit all the parties to a dispute. Moreover, a conventionalist theory of rights is favorable to a fluid conception of entitlements that are sensitive to persons' characters, ambitions, and values, but also to the fact that individuals' reliance to some resources and territories can change with time, as their interests adapt to new circumstances. In fact, conventions will change when, for instance, new members join the community and participate in shaping expectations and regular behaviors. Conventions may also change when the same community is faced with the challenges posed by non-renewable resources or pollution and climate change, and must modify its social norms to respond to new circumstances.

In the section that follows, I describe the conventionalist approach and the theory of rights that it supports. I then show that the pure conventionalist approach presents two important flaws and is unable to offer the grounds for the establishment of exclusive jurisdiction over a territory and of duties upon others to respect existing social norms. I discuss how we can overcome these issues by introducing a legitimate threshold in Chapter 6 and propose that we must identify one universal understanding of why territory is important that limits the role of community specific narratives in determining exclusive territorial rights. The aim is to combine the two strategies to address the limitations of both and make use of the different important principles that they promote.

After showing the limitations of a conventionalist approach, I put them aside for the rest of the chapter and argue in Section 4 that we have moral reasons to respect social norms, regardless of whether they are morally virtuous or not. I then discuss how this approach is fit to tackle issues regarding territorial rights, such as its ability to address the particularity requirement and the fact that it does not require an account of original acquisition. I conclude with the outline of my proposal for a legitimacy based conventionalist approach to territorial rights, which will be discussed in detail in the following chapter.

2 Conventions

Territorial rights are not dissimilar to property entitlements. Territory is for individuals and groups a means to preserve and protect fundamental interests, just like the possession of the personal holdings that affect them directly. The rules on property, moreover, are the most prominent expression of how individual interests can be evaluated and calculated with reference to exchangeable things. Property exemplifies how persons come to ensure the means for the realization of their aspirations and their ability to appraise these aspirations in a tangible form.

For Hume, property is a system of rules that determine and regulate the relation between individuals regarding the possession and use of objects. In his view, the adherence of agents' behavior to a system of property that individuals settled through conventions is what counts as justice.² Justice in this view is the correspondence of individuals' behavior to a set of pre-existing entitlements.³ The establishment of a system of entitlements is thus conceptually and morally prior to the determination of principles of justice. Once a group of individuals settles for a system of rules of cooperation, these entitlements constitute the foundations of just social relations. Spontaneous social arrangements grounded on bargaining and compromise are the source of rights, and thus also of justice. Given that different communities may develop different sets of entitlements, justice may differ radically depending on where and how its sources emerged and what type of cooperation problems gave rise to it.

Social arrangements come to existence and become effective in virtue of them being followed and implicitly recognized. They are models, schemata,⁴ or scripts⁵ that people employ when facing the need to take actions in particular types of situations. They offer a sequence of actions that people came to believe appropriate in a specific situation in virtue of their beneficial consequences, or in virtue of them being

² David Gauthier, "David Hume: Contractarian," *Philosophical Review* 88, no. 1 (1979): 4.

³ Friedrich A. Hayek, *The Constitution of Liberty* (London: Routledge, [1960] 2006), 2.

⁴ Cristina Bicchieri, *The Grammar of Society* (Cambridge: Cambridge University Press, 2006), 93.

⁵ Gerald Gaus, *The Order of Public Reason* (Cambridge: Cambridge University Press, 2011), 166.

commonly followed in particular situations. These norms do not necessarily have to be fully articulated or expressly stated to exist. In fact, a social norm is in existence when it is followed by a sufficient number of people, generating the social benefit of cooperation as a matter of fact.⁶ Gaus describes the process involved in following a social norm as follows:

once a situation is categorized as being of a certain type, a general series of action is seen as appropriate. When individuals come to share the same scripts, they have a shared understanding of the general sort of actions that are appropriate once they perceive this as a case of “circumstance C”. Scripts may be quite complicated, and individuals may share the same scripts, and thus rules, without being able to fully articulate them.⁷

The acceptance of a social norm, just like its emergence, need not be the consequence of an express arrangement between individuals. However, the population that creates them and follows them can be said to have accepted those social norms.⁸

Social arrangements can emerge as a solution to coordination problems or to cooperation problems.⁹ Coordination problems are those in which the parties prefer to harmonize their behavior with that of others, since in these cases cooperation is in accordance with their narrow self-interest. One example of coordination is that of two people on a rowing boat having a direct and immediate interest in coordinating their efforts for the mutually preferred end of moving the boat towards a destination. In fact, if they did not coordinate their actions, they would not be able to move at all. In coordination problems, every participant in the collective action prefers

⁶ David Lewis, *Conventions* (Harvard University Press, 1969), 98-99.

⁷ Gaus, *The Order of Public Reason*, 166.

⁸ Kukathas speaks in this regard about acquiescence (Chandran Kukathas, *The Liberal Archipelago* (Oxford: Oxford University Press, 2003), 201; Andrei Marmor, “On Convention,” *Synthese* 107 (1996): 354.

⁹ Bicchieri describes three types of norms that may emerge in these two situations: conventions, descriptive norms, and social norms. The norms may emerge as the solution to a coordination or a cooperation problem, but their nature depends on the belief that individuals have regarding the object that they regulate. The violation of descriptive norms and conventions has the mere consequence of making the empirical fact described marginally less true. The violation of social norms, instead, is followed by social and possibly moral reprehension. (Bicchieri, *The Grammar of Society*, 21).

coordination to non-coordination, from a private incentive point of view. The successful achievement of coordination, in these cases, benefits all participants.

In cooperation problems, on the other hand, the participants' private incentives favor individuals' defection, although cooperation in repeated interactions would realize a higher benefit than uncoordinated activity.¹⁰ In these situations, the assumption regarding individuals' private incentives will not suffice to create a legitimate expectation on members of a community that most people will in fact cooperate. What explains generalized compliance in these cases is that the participants give meaning to a particular mode of social interaction and have reasons to blame those who don't comply with it. In these situations, the distinction between private incentives and interests is of outmost importance. As persons come to realize that their aspirations require a long-term commitment to plans and a certain stability in possessions, they are led to reflect on the ways to achieve such security. Thus, they become interested in the cooperating with others to secure their best option at pursuing significant and complex personal goals.

In the case of territorial rights, just like for property rights, we may assume that most of the time individuals prefer to have something to not having it. We may also assume that all members of a group would prefer to hold on to the territory and resources that they have and to acquire more if they can. So for example, one family takes possession of a piece of land and uses it for self-preservation. Imagine the land borders with a piece of land possessed by another family that for one day a month leaves the land unattended. The first family will have a personal incentive to take the fruits growing on the trees in the second family's land when its members are not tending to their possessions. They may be able to acquire the fruits of that tree by, for example, trading with their neighbors. However, the immediate benefit of taking what they want is higher than that of otherwise engaging in any transaction that respects the second family's possessions.

When the families fail to respect each other's possessions, then the chance that they will cooperate diminishes, making the benefit of social cooperation unachievable. When the two families cooperate, on the other hand, they are able to increase the

¹⁰ A classic formulation of cooperation problems is the prisoner dilemma.

outcome of their work, as they do not need to continuously tend to their possessions to ensure that their land is not being exploited against their permission. Settling some form of stable property allows both families to pursue their plans more efficiently and to lay the ground for future beneficial cooperation.

Noncompliance with norms defining territorial holdings is likely to be regarded as a very serious offence, given that it threatens people's livelihood and future prospects for prosperity. Given the importance of such arrangements within a population, property is generally regulated by norms the compliance with which is not only empirically observed but also expected and the non-compliance is sanctioned. Rules of property and, thus, also of territorial rights, are a typical solution to cooperation problems adding the cost of social and, when the stakes are particularly high, of moral reprehension to the immediate benefit of noncompliance.

The consolidation of social arrangements depends ultimately on individuals' beliefs and interests regarding the object that they regulate.¹¹ Persons' convergence on a set of arrangements emerges as the product of people's interaction in a particular situation. When the bargaining procedure necessary for a population to agree on a rule is too costly, its members will converge on ratifying a set of behavioral patterns that are somehow salient – that represent the strongest imaginative connection with a rule and the achievement of their interests.¹² Hume suggests that the case of property rights is not very different from the one of a party of people at a table waiting to dine. When faced with the issue of distribution of resources, individuals will simply ratify what is already settled – either by accepting the actual current holdings, or by relying on precedent rules that deal with similar cases.¹³ So for example, if they can't effectively sit at a table and decide who gets what food before they are all allowed to eat and drink, they will likely start by taking the food that is closest to their hands.

The origin of the salient behaviors (how the precedent was established, or how the possessions were first acquired) is of little importance, as long as they represent an efficient system in settling secure expectations. Contract could also be the origin of a

¹¹ Bicchieri speaks of “the expectations and motives of the people involved.” (Bicchieri, *The Grammar of Society*, 29).

¹² Lewis, *Conventions*, 38.

¹³ Hume, *Treatise*, III.

convention, but its normativity does not come from the consent that has established the convention, but from the fact that the convention solves a problem of cooperation.¹⁴ Conventions on property are thus grounded not on *interested obligation* – the establishment of consented mutual obligations – but on *interested recognition* – that is the mutual recognition of each other's interest in settling a system of secure expectations.¹⁵

In section 5 I suggest that the little importance that these theories give to the origin of entitlements allows conventionalist theories to easily overcome the complication of offering a convincing theory of original acquisition. Moreover, the fact that social arrangements' existence depends on their actual ability to regulate behaviors regarding the control of a particular territory allows these theories to also address the particularity requirement. Before I argue for the advantages of the conventionalist approach, however, I discuss its flaws to show why a legitimacy constraint is needed for conventions to ground exclusive titles in land. My proposal relies on conventionalism to establish some titles to land. However, the inability of conventionalist theories of rights to offer a theory of normativity and an external standard of evaluation of social norms, illustrates the reasons behind its little success in the literature on territorial rights.

3 The Disadvantages of Conventionalist Theories

The conventionalist account offers a convincing story about the emergence of relations that give rise to an effective social order. Many different types of social orders can emerge from individuals' interaction: the resulting system of rules may in fact result in arrangements that are not only suboptimal but also repugnant. Moreover, the conventionalist theory only suggests that social norms are an effective solution to cooperation problems. However, this fact is not sufficient to show that titles that emerge from conventions are due respect from those who have not endorsed them. Their empirical existence is not sufficient to ground any normative

¹⁴ Lewis, *Conventions*, 36.

¹⁵ Gauthier, *David Hume*, 24.

demand, and this is particularly problematic for territorial rights, as they require that entitlements are not merely respected within a particular community, but also that outsiders to that community recognize them.

3.1 *Unfair Norms*

Conventionalism is committed to the idea that what emerges as spontaneous order constitutes the ground for what counts as just behavior. This view excludes that there can be an external moral standard of evaluation to determine a person's obligations to another. As morality emerges together with the establishment of social norms, the conventionalist approach is unable to offer any sufficient guarantee that the system of entitlements emerging from conventions will secure the interests of all those participating in the convention.

Social norms, for this approach, simply ratify whatever stable system of cooperation is in place. Regardless of our assumptions about the state of nature, it is reasonable to expect that different conditions will lead to different types of social conventions. We can expect that in some situations the actors involved will manage to acquire roughly what they need. In that case, the resulting system of norms would ratify a situation where there is no extreme dissatisfaction and individuals benefit from the stable and acceptable set of expectations that the system of social norms offers.

However, we can also imagine a situation in which, for example, some chooses not to work the land but to steal others' work. We can imagine that those who steal start plundering some pieces of land currently possessed by others. Imagine also that the people whose land is continuously plundered manage at some point to settle a convention with the aggressors according to which, without resistance, they will pay a fee a little lower than the value of what the aggressors manage to pillage in a month, in exchange for ending violence. The current victims gain the benefit of not being killed and raped, and the aggressors save energy and limit the risk that the

victim will repel some of their attacks.¹⁶ This arrangement between aggressors and victims is indeed a step forward from the state of nature, where – in this example – the victims do not only lose all their possessions, but also risk losing their lives. Moreover, both the victim and the aggressor can now rely on a secure set of expected behavior and plan their future interactions accordingly.

However, regardless of how stable this convention might be, the thought of it is profoundly distressing. The conventionalist account has little to say in response to this scenario as it must accept any norm that does the job at allowing people to rely on some type of stable expectation. The Humean could argue that such a situation would still allow the victims to survive, to work harder, and to save some resources after paying the fees owed to the attackers. With time they could save enough to hire protection and renegotiate the terms of their relationship with the aggressors. However, even if the influence of the aggressor were not also growing with time, making it harder for the victims to better their situation, it would not be extremely controversial to say that the emerging situation strikes us as unfair.

The Humean could also argue that such a norm would be unsustainable if those oppressed were many, since the oppressed, given the opportunity, would rise and break the status quo. Unfortunately, we have witnessed similar situations in the history of men that do not always result in enfranchisement. And when they do, they are often the result of a violent uprising that results in other forms of oppression.¹⁷ Without having to imagine a hypothetically bad convention of this sort, we could think of slavery as a social arrangement that is morally repugnant. In a scenario where slavery is possible, it would be harder for a Humean to argue that the norm will at some point undergo modification because it doesn't fulfill everyone's interest. In many countries forms of slavery are still present, and where it disappeared it was at the cost of conflicts and political disorder.

¹⁶ In fact it is not particularly difficult to imagine such a convention – Mafia's "pizzo" works exactly like this, and it is such a successful convention that it has survived for more than three hundred years, longer than the Italian state itself.

¹⁷ The French revolution is a classic example, but contemporary Egypt and the revolution in Syria offer unsettling new cases that show that violent uprising is not conducive to increased individual freedom.

But even if at some point the situation would sort itself out by the emergence of fairer social arrangements, and thus also more stable, we would still lament that the first arrangement was unfair and that at best it had burdened some excessively, even if their sacrifice gave the population an opportunity to avoid social disorder. The Humean account doesn't consider the substance of a conventional rule as morally assessable, given that the convention provides the standard of evaluation of existing normative relations. Conventions, thus, can only be evaluated by reference to their positive consequence in creating a system of stable expectations. This, however, falls short of addressing our preoccupations regarding the realistic occurrence of repugnant social norms that must be evaluated with regards to a standard external to the conventions themselves.

3.2 *Outsiders*

The second problem of a purely conventionalist account of territorial rights is that it is not fit to offer a theory of normativity that explains why individuals that do not yet participate in the conventions should respect a community's social norms. Those who participate in the convention may have some prudential reasons to comply, such as a desire to avoid social reprehension or other types of sanctions, or an interest in continued cooperation with their fellow members of society. But those who have no repeated interaction with the relevant community and are outsiders with respect to the community's norms may be incentivized to free ride, having no reasons to respect the social arrangements in place. The conventionalist account lacks a theory of normativity and is unable to explain what moral reasons one may have to respect and comply with existing norms. The fact that some social arrangements exist is not in itself a reason to respect them, and neither is it a reason to impose duties on others regarding the use of resources and the control of territory.

Consider for example the case of the Russian government that takes an interest in Cyprus because of its geographical location, which if controlled by Russian strategists would give them some military advantage. Imagine that the conventional system of territorial rights in Cyprus is that the northern part of the country should be

demilitarized, given the current difficult relation with its neighbor, Turkey. Imagine also that the Russian government has no real interest in building a long-standing relation with the local population but that it only needs to take control of a small portion of an uninhabited area in North Cyprus. The Russian government may not care about the benefits of continued cooperation with Cyprus, as long as it can ensure control over a small geographical area there. The prudential considerations of the Russian government only need to account for the sanctions that Cyprus would impose on free riders and for the chances that they will actually be imposed on its actions in this case. Were these prudential reasons to disappear, for example because Cyprus is unable to secure international cooperation to impose these sanctions, the existing rules on the demilitarization of Northern Cyprus would mean very little to Russia.

In fact, Russia does not expect any benefits from repeated cooperation as it does not expect repeated cooperation at all. There is, thus, no competing reason not to prefer immediate benefit from free riding the convention, and settling a military base in Northern Cyprus. Russia, the outsider to the conventions for this account, will only have a reason to violate the convention and take what it needs, without regards to others' expectations. Nor can the population reasonably expect Russia to follow the convention, as it is joining only temporarily and has not given any legitimate reason to expect that it will conform to the convention, given that it has never conformed before.

Conventional theories of entitlements are mainly concerned with describing systems of cooperation that emerge within a local population. The validity of the explanation about the emergence of rights that they provide is limited to the relevant population in which the convention has actually emerged. Individuals can in fact have legitimate expectations that others will comply with the convention only if these others are engaged with each other in repeated similar situations in which cooperation is needed. If people are not going to benefit from existing conventions, one can have no legitimate expectations that they will comply with them.

4 The Moral Value of Social Norms

In the sections that follow I give three reasons why the social norms that a community develops deserve some respect, in so far as they effectively order social cooperation within the relevant group. What I mean with deserving respect is that conventions should be considered sources of social obligations. Individuals subject to particular conventions have a *pro tanto* reason to comply with an existing practice for the sole fact of the practice being effective. Moreover, I also suggest that outsiders to the practice have some obligations of non-interference with an effective practice.

This, however, does not exclude that there may be other reasons that defeat the ones that demand compliance or non-interference with the practices. I only suggest that the existence of stable and settled practices establishes demands on individuals' behavior that have genuine weight when contrasted with other reasons. In particular with respect to territorial rights, the existence of settled practices establishes on outsiders some duties of non-interference with individuals' use of land and resources, regardless of the moral virtue of such practices. Moreover, practices establish some associative obligations among the members of the relevant community, in so far as they successfully preserve a system of stable expectations.

In what follows, I consider the reasons why social norms deserve some respect. First, social norms facilitate peaceful interaction between persons. The absence of violence and threat is a preeminent moral value the pursuit of which warrants respect for effective social norms. Second, social norms offer the basis for stable expectations within a community of people, which allows them to pursue their plans. Finally, social norms are one of the expressions of individuals' moral agency and their values.

4.1 *Peace*

Social rules provide for an alternative to chaos and violence. Their existence indicates at least that the population prefers some type of order to disorder, regardless of the moral virtue of the particular arrangement in place. The stability that social rules

promote is to be protected because peace is a fundamental moral value, and the presence of norms and social arrangements expresses one of the ways in which persons have successfully achieved that goal. Maintaining peace is necessary for the promotion of all the other morally valuable social goals. It is thus an instrumental moral value that draws its strength from the fact that peaceful cooperation of some sort is necessary if we want to realize many human goods, such as wellbeing, health, or the protection of fundamental rights.

Because of its fundamental importance for the realization of our goals, and because of the vanity of violence and sufferance, peace should be considered a fundamental value of liberal political theories. This contention is more controversial than it may seem at first. One may ask whether a regime benefitting from the resource curse and upholding slavery for the purpose of mining precious stones, in any way demands our respect for the mere fact of it offering some grounds for peace. I do not think that conventions should be respected and complied with every time they offer a solution to a source of conflict. However, when they do, and even if they are wicked, our commitment to peace may demand that we refrain from interfering in ways that could disrupt order and escalate violence.

This does not mean that one should not interfere with repugnant norms, or that one must always uphold them and comply with them. In fact, there are many ways one can interfere with repugnant social orders without necessarily and dramatically disrupting peace. Our commitment to peace requires that, when possible, interference should be favorable to a peaceful transition away from repugnant norms. For example, one can offer assistance to those who are subject to unfair norms; other communities may exert pressure and promote alternative values within the wicked community through economic interaction, diplomacy, and economic sanctions, among other peaceful methods. Finally, propaganda, free exchange of information, and education can empower those subject to unfair social norms with the tools for reformation and participation in the creation of new social arrangements, without necessarily setting the basis for violent revolutions. I suggest that outsiders and dissenters have a freedom to interfere with repugnant norms but do not have a power to forcibly substitute and reform repugnant social norms, unless they also uphold powers of jurisdiction within the relevant territory.

4.2 *Stable Basis of Expectations*

Social arrangements offer a stable basis of expectations that is functional to the establishment of the conditions for social cooperation. Even the worst distribution of holdings provides some type of security, allowing also the poorer individual to adjust his or her expectation on what others will do in a specific situation and on what is available to him or her. Because stability of expectations is an important collective good, conventions deserve some respect to the extent that they achieve that goal.

Territorial rights have their origin in social arrangements and draw their moral merit from the beneficial consequences of settling a system of entitlements. A system of entitlements offers the required order, providing the community with a set of rules of behavior to hold towards others and with regard to their territorial holdings. These rules also provide individuals with a set of expectations that others will behave in compliance with the rules established.

When individuals can rely on the knowledge of others' probable behavior and others' expectations regarding the actions of their fellow members' of society, their cooperation becomes possible. Social cooperation is in fact only possible if people can be at least minimally sure that others will comply with some expected behavior. Such order is beneficial to the general community and works against the immediate benefit of defection. Regardless of the distribution that the convention ratifies, a system of mutual relationships grounded on the respect of rules and free from violence and uncertainty is a factor that brings stability and some beneficial consequences.

It is of little importance for this account whether some people manage to secure a large amount of resources, while others instead remain with very little or nothing. This is because once possessions are settled in a system of entitlements even the poorest man can lead his life knowing what he can expect from others and what he can or cannot do legitimately. Settling rules of property in territory and resources allows people to forecast what others will or will not do – for the most part – and

effectively make plans for the future regarding the control and exploitation of territorial resources. Social constructs are thus beneficial for each participant and for the population as a whole.

The benefit of a stable basis of expectation, similar to our commitment to peace, is a morally valuable feature of a social order. And, like peace, it may demand some obligations of non-interference, if not obligations to comply with some of the existing social norms. This does not deny that some instances of social norms may require reformation when they violate more important moral values. However, as suggested earlier, one may permissibly disrupt order if interference does not preclude individuals' ability to form and pursue their legitimate ambitions.

4.3 *Agency*

If you are travelling through Sweden and you need to stop for the night, you may consider bringing your camping gear with you. Each property owner, in fact, must allow travelers to camp in their property under the Right of Public Access, which dates back to Swedish local laws and customs of the Middle Ages. According to this (now codified) right, one has the freedom to camp anywhere in private and public land, as long as one respects some rules of courtesy, such as camping not too close to someone's house and limiting one's stay to one or two nights in the same spot.

In Sweden, then, a property owner would have no title to deny to the traveler the use of a piece of his land. It would also be considered blameworthy if, after one evening of stay, the property owner would ask the traveler to leave. It is in fact accepted that the traveler should respect the privacy of the property owner, and as long as he exercises his freedom within the limits demanded by respect, he is free to occupy the property owner's holdings. In the USA, instead, the unacceptable thing to do would be to trespass on someone's property and freely camp there. The property owner would not only have the legal right to tell the traveler to leave, but he would also not encounter any social reprehension, as his behavior would be consistent with his community's belief about private property.

In many situations what is appropriate depends on the general practice accepted within a particular community (whether the practice is ratified in laws or not). In the example of the Right of Public access, the practice of travelling and enjoying nature that is distinctive of Scandinavian culture makes the activity of being free to camp anywhere a valuable one. Differently free camping is not considered as a valuable activity in the USA, and this is reflected in the existing norms against trespassing.

The practice, in this example, gives definite shape and detail to a relation between members of a community and with respect to their use of the territory available. Without the practice of Public Access, the value of roaming through natural landscapes would have a much different role in that society. The practice has also a wider application, as it gives outsiders the same freedom to roam around and camp through Sweden freely. The practice thus reflects the community's belief that the value of traveling and enjoying nature is one that can be generalized. This example shows that practices may have a role in validating a value and defining it for a particular society. Roaming freely through nature is a value recognized in the USA as well, but there it is defined as the public provision of spaces for camping, and it does not justify camping on private property, which would be considered by Americans a violation of a fundamental right. Conventions then may give details on how a community interprets a value and its weight with regards to other values.

Because they give detail to a more fundamental moral value, the practices themselves are valuable. Consider the morally relevant concern of distributing resources according to some fair standard. Practices or institutions that address this morally relevant issue, such as private property or collective property, do not only offer a solution to the allocation of resources, but they also promote other values and moral principles. For example, private property may be preferred by a society that values individual autonomy, but collective property may be preferred if we are more concerned with, for example, the value of collective self-determination.¹⁸ These practices derive their value from basic moral concerns but develop through different paths depending on the community's beliefs regarding the hierarchy of some other moral concern (those of individual autonomy or collective self-determination in this

¹⁸ Thomas M. Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998), 356.

example). The resulting set of conventions would then reflect in some way what people within a community consider acceptable or important in relation to some fundamental moral concern that is intelligible by outsiders as well, such as resource allocation.

Conventions do not simply define generally accepted moral values or principles. They also make available to individuals the values that they collectively define, empowering them with a set of options to develop and pursue their life plans.¹⁹ For example, the practice of visiting Mecca for a Muslim may be explained with reference to the morally valuable practice of religion. By being exposed to the practice of pilgrimage to the Kaaba in Mecca, Muslims access the values promoted by their religion and the value of meditation and mystical experience. Pilgrimage is one of the ways in which religious sensibility may be expressed. Different from the case of the institution of property, pilgrimage is not a solution to a morally relevant problem. Nevertheless, its relevance in the lives of individuals is tangible as it allows some to access to complex systems of values and beliefs.

Practices, then, may identify the specific ways in which a community expresses its interpretation of a moral value that can be universally appraised, and also allow individuals to develop their identity by having access to a variety of systems of values. Respect for people's ability to shape their moral environment thus commands respect for their practices, even if these practices are not the expression of values that every community considers chiefly important.

According moral weight to conventions is compatible with the idea that there are moral values that can be appraised universally, regardless of the particular local sensibilities. It is also compatible with the idea that we should give the right consideration to the many ways individuals as members of communities pursue what is important to them.²⁰ The moral weight of practices offers some reason to both insiders and outsiders of the practice to respect the convention itself. The fact that a

¹⁹ Ibid., 347.

²⁰ I am proposing something similar to what Scanlon calls the Principle of Established Practices that holds that if a "(nonrejectable) principle is generally (it need not be unanimously) accepted in a given community, then it is wrong to violate it simply because this suits one's convenience" (Ibid., 339). If we agree with Scanlon that there is a nucleus of moral principles that can be universally appreciated, we can also agree with him that practices have some role in specifying those principles.

convention shapes others' expectations gives the members of the relevant community a reason, even if only prudential, to comply with the practice itself. Outsiders, on the other hand, have a moral reason not to undermine others' practices, given that these practices define moral values that support individuals' self-government.²¹

The extent to which insiders and outsiders should respect practices is unclear unless we identify the core of our moral concerns. The conventionalist theory offers only instrumental moral reasons to respect existing social norms and falls short of identifying which practices ought to be respected unconditionally. Nevertheless, to the extent that practices express a population's values and their interpretation of the nature of social cooperation, they demand some compliance. As long as these practices do not violate more fundamental values, tolerance for others' moral agency may demand that we abstain from judging their practices and the role that they give to different values through their social arrangements.

In my proposal, such practices constitute the grounds of freedoms to use and powers to control territory and resources, even if they do not come accompanied with protective claims and immunities. Even if the incidents that social norms establish are not exclusive, they still denote that their holders have some relevant interest in those territories and that their interest grants some type of normative protection in the form of freedoms and powers. In the next chapter I explain how these freedoms and powers may become exclusive titles to territory and acquire protective claims and immunities.

5 The Advantages of a Conventionalist Theory

The conventional aspect of LBC makes it a direct theory: a group acquires territorial rights because they are in themselves necessary for the protection of individuals' interest in being self-governing. For LBC, a group acquires territorial rights, including territorial jurisdiction, if these titles are expressed and defined by the

²¹ Provided that outsiders also respect individuals as project pursuers.

community's social norms. Existing social norms protect stability of expectations, peace, and express moral values that allow individuals to form and pursue their life plans. Thus territorial rights defined by social norms in themselves allow individuals to be project pursuers.

LBC is well suited to address the particularity requirement: if a social norm that impinges on a territory exists, it necessarily involves one particular territory, as its existence depends on its effectiveness in ordering a particular set of relations in a defined situation. Some norms do not impinge on a geographical space. So for example the rule according to which one should not write obscenities on an online forum applies to people wherever they are. However, most social norms have validity within a particular geographical area. The range of effectiveness of such norms also identifies the resources and territories that are subject to the rule.

Consider the example proposed by Marmor:

Somewhere in the English countryside, there is a very narrow bridge over a river, built many centuries ago. Since it is not possible to cross the bridge from the two directions at once, a convention has evolved that if people approach the bridge from both sides at once, those who come from the north are to pass first. Since there are many travellers in this area, the local villagers have put up a small sign, informing the travellers of this convention. ... The rule serves for the local villagers, who are perhaps more intimate with the convention, the same purpose as it serves for strangers: it simply coordinates their passage over the narrow bridge.

In this example, the rule is effective only if it is applied to that particular bridge, as we could assume that another narrow bridge may be regulated by a different rule – for example that those approaching from the south have the right to go. The rule defines the appropriate behavior, and at the same time the area of validity of the rule itself, giving to a particular geographical area a specific role in the system of expectations that the rule establishes.

The fact that conventions identify the object of territorial rights also ensures that the resulting theory of territorial rights is not overly ethnocentric. Through their system

of social norms communities are able to express their narrative regarding territory and the values that they attach to it. On the basis of their practices they are able to communicate what resources are important to them and why. Conventionalism takes seriously a community's social arrangements and does not impose a pre-made concept of resources that would frustrate particular groups' sensibilities. However, this approach is likely to tilt the balance excessively in favor of special demands to territory and resources, and leave little space for the demands of global justice. In the following chapter I offer a solution to this problem, by introducing a limitation to community specific demands in the form of a threshold of legitimacy.

The conventionalist approach is also able to address the *in rem* problem. By determining the group that holds social norms that impinge in a particular territory, the conventionalist theory also determines the group that can legitimately assert jurisdictional powers within a geographical area. Only the community that upholds a system of social norms within a territory may assert territorial jurisdiction there. There may be situations in which two communities uphold separate and tangled practices within the same geographical area. For example, it is possible that a nomadic community may use a territory that is also the location of the life plans of the members of a stationary community. In this case, two or more communities may have legitimate and overlapping demands to the use and control of the same territory.

Conventionalist theories thus do not entirely exclude that in some situations two or more agents may have competing powers of territorial jurisdiction within the same borders. However, they indicate without confusion which parties hold territorial jurisdiction, even when the parties may have to share powers and freedoms over the same territory and resources. In Chapter 6, I show that the legitimacy threshold is able to indicate to what extent each coexisting community may be able to assert exclusive titles to territory. I will argue that, when a community fulfills the requirements of legitimacy, it may only assert exclusive titles to land and resources that are necessary to maintain the legitimacy of its social norms. Above the threshold of legitimacy, conflicts between coexisting communities and competing legitimate freedoms and powers will have to be resolved via a mutually beneficial compromise.

In Chapter 7 I discuss how LBC is able to address cases of overlapping freedoms and powers.

By protecting individuals' preferred choice of social cooperation, conventional theories are also well suited to put individuals' life plans and expectations at the center of our moral concerns and above other interests, such as national interests or security. Because individuals' life plans change, moreover, the titles that a community is able to secure will adjust as its members' practices and beliefs change, ensuring that territorial rights represent as much as possible the current interests of those who uphold them.

Finally, the conventionalist approach avoids also the complication of offering a compelling story on original acquisition. For direct theories relying on a Lockean theory of property, an agent may acquire titles in land only by original acquisition or via valid transfer. In this second case, if the original title is invalid because it was not acquired through legitimate original acquisition, all the subsequent titles must be considered invalid as well. This framework is problematic for a theory of territorial rights as it is often the case that states exert political jurisdiction within territories that have been acquired through conquest or illegitimate transferal. A conventionalist theory is not concerned with the origin of titles to territory and offers the tools to evaluate current interests, giving them moral priority.

With regards to territorial disputes regarding lands that were unjustly occupied in the past, a conventionalist theory requires that we address grievances on the basis of existing interests to contested territories. Those who have lost land in the past should be allowed to participate in the determination of new territorial rights through a compromise, as long as they still have an existing interest in the contested territory, the satisfaction of which may not be attained with the control or use of any other territory. As long as traces of the past violation of titles to land are detectable in the interests of current descendants of past victims, the weight of current interests will have to be taken into consideration when balancing existing legitimate and overlapping interests.

6 Conclusions

The conventionalist theory is a good starting point for a theory of territorial rights that is able to address territorial disputes successfully. However, its flaws must be amended if it is to provide a normative foundation for exclusive territorial entitlements.

As I argued in section 3, conventionalism does not offer an external standard of evaluation of the norms that emerge from social interaction, and thus it lacks a theory of normativity. For this reason, purely conventionalist theories of territorial rights cannot explain why there are some social arrangements that we deem unfair or suboptimal (such as slavery or the rule according to which women cannot have property) and that for this reason should be rejected. Moreover, even if the members of a community may have some prudential reasons to comply with the established rule, prudential considerations cannot apply to those who can easily free ride and who have no interest in repeated interaction with the relevant community. Even if the members of a community may converge on some type of agreement on the rules that apply to a certain situation, this fact says nothing about the reasons others should comply and respect existing social arrangements, and it is unfit to force upon others duties to respect territorial holdings.

In the following chapter, I introduce a threshold of legitimacy. I argue that legitimacy offers a normative basis to identify which conventions create claims that others respect the relevant community's freedoms to use territory and resources, and immunities against others' overlapping territorial jurisdiction, and which, on the other hand, only establish unprotected freedoms and powers. The guidelines that a legitimacy threshold offers allow us to look at a territorial conflict and identify which of the interests at stake must be protected with exclusive titles to territory and which, on the contrary, must be added to those elements of the conflict on which the parties will have to compromise. I will argue that a system of social norms is legitimate if it sufficiently respects individuals' ability to form and pursue directive ends. According to this account, if the system of norms that has been established does not sufficiently respect individuals as project pursuers, we have no reason to respect the territorial rights defined by existing conventions as exclusive entitlements to territory.

So for example, imagine a norm is established that prohibits women to enjoy basic economic rights. We may have moral reasons to respect the existing arrangement because of our commitment to peace, to the benefits of a system of stable expectations, and to tolerating others' existing commitments to their values and plans. However, when it is a challenge for women to develop and pursue their directive end because they are being denied the basic faculty to acquire food and water, members of the community and outsiders have a reason to reject the community's claim against others' interference with their resource rights, and to also reject its immunity against others' territorial jurisdiction. In this case, members of society and outsiders have a reason to reject the demand of the community for exclusive territorial rights, given that the norm does not match the fundamental preoccupation that all members of society have at least a genuine opportunity to develop and pursue directive ends.

The minimal requirements of legitimacy are compatible with the instrumental moral reasons to respect existing social norms that I have laid out in this chapter. Members of the relevant community continue to have a reason to respect the convention because of the existing expectations of their fellow members of the population. The commitment to respecting people as project pursuers works as an additional moral reason in favor of complying with the conventions that embody it. That is to say that if a convention is not legitimate it still grounds some freedoms and powers of the community regarding the use and control of the territory at issue, as the members of the population rely on the existing social norms for their plans, and in so far as these norms effectively achieve the goal of peace. However, if the norms fail to meet the legitimacy requirement, the community's freedoms and powers on the territory may not be exclusive. This means that the community's powers are not protected by immunities against others' competing powers, and that the community's freedoms are not protected by claims that others do not interfere with their exercise.

The requirement of legitimacy does not demand that each community upholds values of equal freedom and equal moral agency, but it does require that individuals are at least able to value the system of social norms as one that allows each member of society, and outsiders, to develop and pursue their life plans. I will describe legitimate conventions in detail in the next chapter. In short, a system of legitimate entitlements

should provide relief against extreme poverty and poor health for the community's members, ensuring that all members enjoy a sufficient level of wellbeing. Such a level may change depending on the average level of wellbeing enjoyed by the whole community and on the resources available to its members. Individuals should also be able to enjoy basic economic rights that ensure their relative independence from each other. Finally, the system of social norms must tolerate individuals' dissent and their desire to exit the association when they see fit.

Conventionalist theories often rely on the idea of acquiescence to justify the validity of particular conventions: conventions are effective among a population when (and because) people acquiesce in them.²² Acquiescence, however, may emerge also when conventions are particularly bad, and even when a large part of the population is regularly oppressed. People may acquiesce in slavery, if their only option to feed their family is that of submitting themselves to the control of their master. In my formulation, acquiescence cannot be the justificatory ground of a system of conventions. What makes conventions legitimate is instead the fact that they protect some fundamental interests of individuals as project pursuers. One could say that, in this formulation, legitimate conventions realize a state of reliable acquiescence, by allowing all members of society to permissibly disagree and withdraw from the obligations that conventions may impose on them. Reliable acquiescence for the proposed view is a product of legitimate conventions, and not its normative foundation.

At this point one could ask why we need social norms: if what matters is that conventions meet the threshold of legitimacy, then illegitimate conventions should be simply rejected and legitimate ones should be imposed. However, an illegitimate set of social norms still serves the important role of setting the framework on the basis of which peaceful cooperation may be achieved. In this model, any form of stability, however wicked, has the important function of making social relations stable. Thus, it would be against the ideas proposed here to reject an existing social arrangement with the intention of establishing a legitimate system of norms using a top-down strategy.

²² Kukathas, *The Liberal Archipelago*, 25.

First, such strategy would likely not provide a set of norms that carries social normativity, as only spontaneous arrangements emerging from repeated interaction are the source of such system of stable expectations. Second, chaos and instability is to be avoided above all, and thus any strategy that entails the destruction of existing systems of organization and the return to a situation of unsure structures of political authority (such as revolution or violence) would have to be rejected. The retreat to violence is thus excluded among the possible solution to a situation of unfair conventions. Finally, no agent may legitimately assert the power to impose norms on a community, unless it represents the social norms that emerge from the reciprocal normative relations among members of the relevant group. No one besides the members of the community that upholds social norms may in fact assert rights to territorial jurisdiction or resources.

Existing territorial rights that emerge from illegitimate social arrangements should be evaluated and reformed, instead of rejected all together. As it will become clearer in the next chapter, the minimal requirements of legitimacy are not fit to offer a specific solution to cooperation problems. On the other hand, current solutions to such problems have the advantage of being already functional and of having identified one possible avenue for resolution of conflicts. If our theory of territorial rights is concerned with the pursuit of peaceful and beneficial social arrangements, then we should start with what already achieves that goal, even if imperfectly, and pursue legitimate avenues to develop more acceptable social norms.

Chapter Six - Legitimacy and International Order

1 Introduction

In this chapter I elaborate on my account of legitimacy and suggest that social norms are legitimate if individuals subject to them are sufficiently respected as project pursuers. Legitimacy-Based Conventionalism maintains that legitimate conventions must provide for the satisfaction of individuals' basic needs and for a domain of basic rights that allow them to enjoy personal and basic economic freedoms. Legitimate conventions also should ensure that freedom of expression is tolerated, and that individuals are free to leave the community if they wish to do so. The legitimacy test offers a standard to evaluate whether a community can be said to have successfully carved a sufficient space within which individuals have a genuine shot to form and pursue their life plans.

The proposed requirements do not ensure that all individuals have equal opportunities to pursue their plans; they focus instead on ensuring that each individual enjoys a minimum protected sphere of basic rights and freedoms. I suggest that a community that may permissibly demand that others do not interfere with its use of territory must ensure that:

- i) provisions are made for the **sustainable satisfaction of basic needs** such as housing, nutrition, water, health, and basic education;
- ii) individuals enjoy **personal freedoms** and discretion on how to exercise what is generally referred to as **basic economic freedoms**.
- iii) individuals' **freedom of expression** is tolerated. Some form of public participation in shaping the social arrangements to which individuals are subject is allowed, that free access to free information is in some way protected, and that the governing body is non-arbitrary and in some way accountable for wrongdoing.
- iv) individuals' **freedom of association** is respected. They are reasonably free to choose their preferred political and social associations. Individuals should also be able to exit political associations if they do not want to be implicated in the collective

project that their communities endorse, or if the existing social arrangements do not allow the pursuit of their own personal projects.

LBC legitimizes only the community's territorial rights and not all the incidents that it may demand to have. LBC, thus, does not offer a justification for jurisdiction over people in general, such as the right to be the exclusive imposer of law on its subjects, or the right to threaten all subjects with legal use of coercion.¹ LBC legitimizes a limited set of incidents that have to do exclusively with the control and use of territory. I have identified these incidents in Chapter 2, but I also list them here:

- a) Territorial jurisdiction regarding land and resources: powers to legislate, enforce, and adjudicate regarding the use and control of land and resources within the territory;
- b) Resource rights: freedoms and powers to manage, use, and exploit land and resources within the territory;
- c) Immunity against others' overlapping territorial jurisdiction with regards to territory and resources;
- d) Claim that others do not interfere with resource rights, including a claim that others do not enter the territory without permission.

I will offer details of the legitimacy requirements in section 3. Before I do that, I wish to explain why I believe that the legitimacy requirements should amount to a minimal and negative standard of evaluation of already existing social norms.

The first reason for focusing on the minimal requirements of legitimacy is that a minimal protection of individuals' moral autonomy may be the best we can hope for. This may seem just a grim pragmatic consideration about territorial disputes. However, it is a concern firmly secured on the commitment of preserving peace and promoting cooperation. Territorial disputes are often the result of a long history of cultural and ideological conflicts between profoundly different societies. A stable solution to a conflict of this kind is to be found in the parties' mutual acceptance of their conflicting but important interests in the same land. This requires that they address their conflicts with the moral sensibility with which they are equipped at a

¹ Simmons, *On the Territorial Rights of States*, 305.

certain time in their political and cultural development, ensuring that the prospects of a resolution fit the moral sets of values to which these communities are committed.

Proposing minimal requirements of legitimacy increases the chances that the theory may effectively guide not only the resolution of territorial conflicts, but also the prevention of such conflicts in a wide range of situations. The legitimacy threshold offers a test to identify which communities may permissibly demand non-interference with their use and control of certain territories and resources. Moreover, communities that uphold social norms that meet the minimal requirements of legitimacy are able to participate as equal partners in the determination of their more extensive exclusive entitlements. The minimalism of these requirements incentivises them to recognize other legitimate communities' special demands upon the assurance that the difference in practices and beliefs will not threaten their territorial holdings, and their members' beliefs about the truth of their narrative regarding their attachment to territory.²

So for example, the Maori Whanganui river tribes in New Zealand have traditionally considered the Whanganui river a source of material and spiritual sustenance as well as their ancestor. For these people, the exploitation of the river resources by the national government is both a threat to their ways of life and to their narrative regarding their attachment to the river and the river's significance. The loss of control over the exploitation of the river and the possible consequences of an ideological shift regarding the river's role in their culture threatens the tribes' ways of life, language, and their chances to stand the test of time.

The Maori in that area identify with a series of entrenched practices that insist on worshipping the river and using its resources. Even if their practices and beliefs are upheld only by their somewhat small community, and even if the national government may not be able to appreciate their attachment to the river, for LBC the Maori may legitimately assert exclusive rights of access to the sacred site and to demand that others do not disrupt their practices regarding the use of the river, as long as their social norms meet the minimal requirements of legitimacy. Meeting the

² Kolers, *Attachment to Territory*, 271.

requirements would allow them to demand that others do not disrupt their territorial practices, as long as their wider system of social norms is legitimate, and even if it involves illiberal values.

For example, in most Maori tribes the law is unwritten and left to the interpretation of the tribes' chiefs, who are in charge of punishing crimes on the basis of ideas such as disrespect and honor. They decide the type of punishment to impart together with the alleged victims, given the importance in their culture of the concept of revenge, effectively leaving little space for unbiased and independent determinations of the type and intensity of the punishment. This practice is in clear violation of the basic liberal principles of punishment that hold that punishment should be imparted by an independent and uninterested party.

Imagine now that, unless the tribes had access and control to the river, they would lose the opportunity to enforce rules and punish crimes related to the disrespect for the sacred land, endangering the complex system of social relations between themselves and the grounds of respect for their legal and criminal system. This loss would constitute a significant limitation to the community's chances to fulfill the demands of legitimacy, leaving the tribe short of their traditional method of ensuring order, peace, and stability. The loss of control over the river also challenges the beliefs of the members of the community, sending the message that their attachment to the river, and their ways to relate to it and to each other are wrong and not valuable. This negative judgement on their beliefs may endanger both the stability of the relations between the tribes and outsiders, creating feeling of resentment and exacerbating conflict, and the internal stability of the community itself, challenging the cultural and social foundation of their mode of cooperation. Such incursion on the system of beliefs upheld by the community may constitute a reason for the community to fence in their members from any opportunity of cooperation with outsiders, diminishing the chances of a resolution of conflicts regarding shared territories with the central government of New Zealand, and the opportunities for the community's members to access alternative conceptions of the good. This example shows that we have prudential reasons to value as much as possible every form of attachment to land that different communities may develop to avoid unnecessary conflict.

We also have moral reasons to be tolerant of the diverse values that communities may uphold regarding their relation to land. Persons as well as communities should be able to make demands on the basis of what they consider important for themselves. We may not permissibly decide which life plans individuals should pursue, nor which plans are more valuable than others, and thus neither which type of attachment to territory is more apt in establishing exclusive territorial rights. We can only assume that if all people are concerned with pursuing the life plans that they have developed, they will also favor a system that ensures that they enjoy a sphere of basic rights and freedoms within which to promote their particular interests.³ Different groups of individuals will give preference and develop different sets of rights. As long as these respect the basic requirements of legitimacy, we can presume that all individuals will be sufficiently able to promote and endorse their preferred state of affairs. Thus, their system of territorial rights should be accepted, regardless of how incompatible the communities' set of beliefs and practices may be.

A minimal threshold of legitimacy may be the **best we** can hope for at certain historical times also because communities' social norms are intertwined pieces of complex puzzles of practices and beliefs. Beliefs about family, for example, may be tightly interconnected with beliefs about professional achievement and the role of women in the workplace. A community that values family bonds over professional achievement, for example, will inspire its members towards forming plans that include having a spouse and children and maintaining close ties with the enlarged family. Individuals in that community may be less incentivised in moving from where they were born and pursue careers that will lead them abroad. On the other hand, a community that values professional achievements may inspire its members to follow their professional aspirations where they may best pursue them.

The problem arises when the community that values family bonds also values particular types of family bonds over others. Some societies may value only a narrow conception of family, such as the one between heterosexual partners dedicated mainly to procreation. Where such social norms are widely upheld, we may find a whole array of supporting practices that offend and preoccupy us. Communities that

³ Lomasky, *Persons, Rights, and the Moral Community*, 56-83.

display attachment to traditional understandings of family may for example maintain that for the family to be properly protected, women should not be allowed to work, as their moral duty is that of tending to children and the house. This may then lead to support other practices, such as for example polygamy, which allows women to find husbands who can support them and their children once they are widowed but that perpetrate the idea that a woman is not able to take care of herself.

Liberalism is chiefly inimical to discrimination in workplaces on the basis of gender, given that such discriminatory practices violate liberals' commitment to equality of opportunity. However, in some communities, practices such as women's role in tending to their family serve the purpose of maintaining intact the social fabric on which individuals' stability of expectations rests. Customs are often intertwined with each other, and it may be very difficult and unsettling for a community (including their women) to change the way its members treat women without also undertaking changes that affect other social goods, such as the protection of family bonds. Equality and non-discrimination are goals that different societies achieve through different paths and at different times, consistently with the flexibility of their social fabric and the fluidity of their customs. Respecting the different ways in which communities may eventually approach just social arrangements is consistent with our commitment to peace, stability of expectations, and the respect we owe to individuals moral agency.

The minimal nature of the requirements of legitimacy tell us only whether the exercise of political power regarding territory is legitimate, and thus whether and to what extent a group has a claim that others do not interfere with their resource rights, and an immunity against others' jurisdictional powers in the same territory. The power to control a territory is not all a community has in terms of powers over its people, and territorial jurisdiction is not the only way a community can exercise political authority. The requirements for the legitimacy of a community's enjoyment of their territorial rights may well be less demanding than the requirements for the legitimacy of the whole array of normative incidents that make up the community's authority over its members and its rights to self-determination. The protection of individuals' ability to pursue their plans ensured by these minimal requirements is not sufficient, for example, to address the liberal commitment against discrimination on

the basis of sexual preferences or on the basis of race and religion. However, I suggest that for the purpose of controlling territory such minimal protection is enough. This is because territorial control and resource rights are associated mainly with the protection of a system of stable expectations for the members of a community – very much like rules regarding the appropriation of property – and with the basic necessary conditions for peaceful cooperation between individuals.

Finally, different circumstances may require different systems of justice, where the most pressing concerns must go along with a community's technological advancement, its member's moral sensibility, and their needs. For example, in the past twenty years the people of Mozambique have received mosquito nets from international organizations concerned with the poor level of health due to the spread of malaria. Disregarding the net's original purpose, Mozambicans have instead used them as fishing nets to address what for them is a most compelling social need.⁴ This example shows that it may be unreasonable to demand of the people of Mozambique that they ensure that everyone enjoys a good level of health, when their collective efforts are instead focussed in ensuring that their families have enough to eat and survive. Especially when we consider the circumstances of very poor communities, it would be a great burden for them if we were to demand compliance with ambitious requirements of justice to achieve exclusive control of the territories that they occupy.

The proposed set of legitimacy requirements should not only be minimal, but also be understood as negative standards of analysis and critical assessment, in so far as they are not meant to inform how social norms should be designed, but to guide our judgment regarding whether existing social norms sufficiently protect individuals' moral autonomy. As I shall discuss in detail in section 3, the requirements of legitimacy aim at ensuring that every community takes into serious consideration the protection of the weakest members of society, and that each individual has sufficient space for his or her self-government. There are different ways in which a community may satisfy the requirements of legitimacy, given that the central moral concern is

⁴ With the related tragic effects on the fishing population and an environmental crisis. Jeffrey Gettleman, "Meant to Keep Malaria Out, Mosquito Nets Are Used to Haul Fish In," *The New York Times* (2015), http://www.nytimes.com/2015/01/25/world/africa/mosquito-nets-for-malaria-spawn-new-epidemic-overfishing.html?_r=0.

that individuals achieve a sufficient level of independence and wellbeing with respect to their fellow members of society.

The reason to prefer a negative standard is that different communities may develop very different acceptable sets of social norms, and may be able to achieve the protection of their members' self-governement in different ways. For example some communities may promote and defend their members' powers to participate in the political decisions that affect them by favoring political participation. At the same time, these communities may impose significant costs to their ability to exit particular social arrangements. Similarly, some communities may provide a solid system of social support for every member of society and fully satisfy individuals' needs but may require unreserved allegiance to a particular form of social cooperation or religion. For example, some Amish communities are very good at providing their members with high levels of social security. The violation of some social norms are met with very bland punishments that often have to do with public atonement and community service. Famously, most Amish communities reject the penal system of the United States, regarding reclusion in prison an improper way to address the violation of rules. However, membership in such community comes at the cost of homogeneity of thought, religious beliefs, and strict tradional customary norms that many may find overly demanding, including a strict division of roles between the female and the male members of society.

It would be wrong, I believe, not to accord some exclusive rights of control and use of territory to communities that in some way or another are able to secure for their members a certain set of protected freedoms to pursue their life plans. These communities' rights to territory should be respected to the extent that they empower individuals' in forming and pursuing life plans. A negative threshold like the one proposed here gives us the tools to evaluate to what extent such empowerment is achieved and to what extent individuals rely on their community's customs to promote their personal interests.

Depending on its members' values, a community may develop a systems of norms that disregards the values that other communities consider of primary importance. Allowing people to concentrate on what seems most important to them and their fellow members of society, and to experiment with diverse ways to solve pressing

issues, ensures that humanity undertakes the widest range of avenues towards the satisfaction of morally relevant social goods. In fact, people should be free to experiment not only regarding the avenues towards the solution of relevant moral issues, but also with regards to the different importance that moral issues may have in different circumstances. This ensures that we will know at any time, as precisely as possible, that some concerns are more important than others, or that they are important at all. As we speak and debate about different problems and act upon our commitments we also determine their importance for us and for those we engage with.

The combination of a conventionalist theory of rights and a minimal and negative standard of legitimacy frames a fundamentally political approach to territorial rights. The proposal in short is that societies that uphold legitimate conventions may permissibly demand that others do not interfere with their use and control of the territorial resources available to them. However, the requirements of legitimacy also carve the scope of the legitimate demands that a community may advance regarding exclusive territorial titles. A community in fact has a right to exclude others from the enjoyment and control of their resources only to the extent that the exclusion of others is necessary for sustaining their social norms at a sufficient level of legitimacy.

The requirements of legitimacy demand that only a minimal set of basic rights must be enforced to ensure sufficient protection of individuals' basic interests in being treated as project pursuers. This means that the claims that communities hold against others using their territory will be very limited. Most territorial conflicts, however, impinge on the parties' protection of interests that are often more extensive than the protection of individuals' basic interests in being treated as project pursuers provided by the requirements of legitimacy. Conflicts on territory may emerge from the pursuit of collective self-determination, or the interest in religious freedom, or from conflicts regarding the military control of areas of importance for national prosperity, like in the case of Cyprus and the demands to control the island from Turkey, the UK, Greece, and Russia. The protection of these important interests, I suggest, may only be permissibly pursued if the parties reach a mutually beneficial agreement. The parties will have to agree on the extent of their legitimate territorial demands on the basis of their important interest, as long as the protection of these more extensive

titles do not hurt the parties' chances to meet the requirements of legitimacy. The plurality of non-fundamental but legitimate interests in the same territory may ground well-founded competing freedoms and competing and overlapping jurisdictions. I argue by the end of this chapter that conflicts emerging from competing freedoms and powers can be addressed successfully if the parties accept a duty to compromise to achieve a mutually satisfactory and stable agreement.

The establishment of more comprehensive and exclusive territorial rights is thus left to systems of cooperation between communities that have overlapping interests in the same territory or resources. This proposal endorses a political conception of territorial rights that are determined by the interaction of communities and the resolution of conflicts. We cannot demand more than a minimal protection of individuals' freedom from a theory of legitimate conventions, but we can hope to achieve much more if individuals and their communities focus their energies in a continuous and long-lasting effort to engage with others in the protection of their interests.

2 Test of Legitimacy

Legitimacy sets the minimal standards according to which existing social arrangements can be deemed having the force to authoritatively shape individuals' normative relations and according to which coercion is justified.⁵ Legitimate social arrangements identify which protected freedoms and powers one has in particular situations regarding territory and resources.

Legitimacy in general terms is a feature of an agent that exercises political authority.⁶ In particular for LBC, legitimacy is a feature of a class of individuals interacting in the civil society that exerts political control over territory and resources by upholding social norms. Individuals' normative behavior constitutes a "set of formal or

⁵ Leif Wenar, "The Unity of Rawls's Work," *The Journal of Moral Philosophy* 1, no. 3 (2004): 271-272.

⁶ Buchanan, *Justice, Legitimacy, and Self-determination*, 233; Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), 94; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 136.

informal rules, norms, and decision-making procedures governing an issue area”⁷ that reflects their established practices. When I speak of legitimate systems of social norms, then, I refer more precisely to the community’s rightful exercise of jurisdictional powers within and regarding a territory through the determination of enforceable practices and social norms.

LBC takes inspiration from the Rawlsian idea of political legitimacy for decent people. Political legitimacy for Rawls is achieved when authority is exercised according to a system of social cooperation that is acceptable to those subject to it. In a liberal society, the basic structure is acceptable to all reasonable members of society because it is the point of convergence of their diverse but reasonable and compatible comprehensive doctrines. Since these are all reasonable interpretations of what is a valuable directive end, we cannot derive the fundamental principles of legitimacy from any of the particular comprehensive doctrines that members uphold. The only source of principles that can serve as the basis for legitimate political authority is the political culture of the particular society under scrutiny.⁸ Because liberal legitimacy is grounded in the overlapping consensus of reasonable interpretations of equal respect, the exercise of authority in a liberal and legitimate community will also respect the principle of moral equality.

As LBC is concerned with settling conflicts on territory between communities that may or may not be liberal, LBC’s requirements of legitimacy must be weaker. For Rawls in a non-liberal (but decent) society, the exercise of political authority is acceptable to all subjects as long as it meets four requirements: (i) it must ensure the procurement of human rights (among which those to subsistence, security, personal property, formal equality before the law, freedom from slavery and some form of liberty of conscience), (ii) its legal system must impose *bona fide* obligations above those required by the protection of human rights, (iii) its officials must genuinely believe that the law is guided by a common idea of justice, and (iv) it must give its

⁷ Andrea Sangiovanni, “Justice and the Priority of Politics to Morality,” *The Journal of Political Philosophy* 16, no. 2 (2008): 142.

⁸ Wenar, *The Unity or Rawls’ Work*, 268-269.

members a meaningful role in political discussion, offering opportunity for dissent, and for their dissent to be taken seriously by officials.⁹

Liberals are compelled to respect and not to interfere with the affairs of societies that meet these basic criteria of legitimacy because the resulting political arrangements can be considered acceptable for any reasonable member of the relevant society. Even if the system of social norms of a legitimate but illiberal society is not one of the reasonable interpretations of the liberal principle of equal respect, liberals' commitment to tolerance demands that decent societies are accepted as legitimate, and thus as upholding enforceable rights and duties. The Rawlsian approach is interesting for LBC because it identifies the role of legitimacy as a better tool than justice to tackle the vast plurality of reasonable conceptions of decent political orders that can give rise to normative incidents. Moreover, LBC agrees with the Rawlsian idea that the answer to what makes a system of social norms legitimate can only be found in the political culture of the particular society under scrutiny.

LBC ultimately speaks to those who identify with liberal systems of thoughts, and it offers guidelines in accordance with a liberal conception of legitimacy. But it also aims to offer reasons to illiberal communities to join the project of legitimacy on terms that may be acceptable to them as well. It provides for a normative standard that is sufficiently minimal to be met by illiberal communities, and that also promotes acceptable values upon which liberal and illiberal communities can engage towards the resolution of territorial conflicts.

Moreover, LBC does not demand that communities express their social arrangements in specific positive institutions. For example, a legitimate set of social norms does not need to be embodied in a constitution, nor be subject to an institutional process of judicial review. This allows LBC to disregard the size of the communities that can enjoy territorial rights. Legitimate communities for the purpose of establishing territorial rights can be significantly smaller than fully functional states. Communities such as refugees' settlements can be considered having territorial rights, as well as the nomadic communities in the Sahara or the informal settlements in Haiti post-earthquake. These social arrangements need not be of the

⁹ Ibid., 272; Rawls, *The Law of Peoples*, 63-72.

kind that gives rise to state-like institutions. Their ability to fulfill the requirements of legitimacy depends solely on the successful establishment of some kind of social cooperation that sufficiently respects individuals as project pursuers.

Because the principles of legitimacy must be found in the political culture of the relevant community, legitimate arrangements will look different in liberal and non-liberal societies. Illiberal communities may hold beliefs about legitimate authority that are acceptable to most of their members, but that do not realize the principle of equal morality. An illiberal society may, for example, discriminate against albinos because they are believed to bring bad luck, or may discriminate against blacks, or women, on the basis of the belief that different classes of people must have different roles in society. In their internal justification of political authority, these communities may include a reference to why one class is rightfully dominating another on the basis of its superiority, of their inherited royal status, or because of their gender, or the color of their skin. Although unacceptable for liberals, such illiberal political arrangements may be the result of a genuine belief among most of the members of a community that political authority there is justified on the basis of the assertion of some type of superiority of a class of people over another.

A liberal theory of territorial rights has to accept that such beliefs, although illiberal, may be the foundation of legitimate political authority, as long as the domination of one group over another is not an unacceptable violation of the fundamental individuals' ability to form and pursue their directive ends. So for example, a chauvinist community is legitimate even if the basis of its system of norms is the belief that women are not fit for holding political office, as long as women have other significant avenues to participate in the determination of the social norms to which they are subject. This can happen, for example, if they have a significant role in the economic management of their families, and in the education of children, or if there are avenues for women associations to express their dissent with policies that hurt their interests, effectively exercising pressure for social change. This is the sense in which the requirements of legitimacy are to be found in the political culture of every particular community. Liberal communities' internal legitimacy will be more demanding than the standard of legitimacy of illiberal groups, since liberal people will be satisfied only by a system of norms that respects them as equal moral agents. But

to demonstrate that a community may rightfully exercise jurisdictional power within a territory regarding its land and resources it is sufficient that the community's social norms meet the minimal threshold of legitimacy.

The way in which members of different communities understand their attachment to land is ultimately the way in which their attachment should be understood and valued by a theory of territorial rights, if this has a chance to escape the charges of ethnocentrism. To strike a fair balance between universal goals of legitimacy and the protection of community specific ways to understand resources, I believe we must presume that a community's narrative about their attachment to their territory is true. However, a particular narrative must also be intelligible and assessable in general terms by outsiders to the community. The requirements of legitimacy intended as a minimal and negative standard offer to outsiders guidelines to navigate and evaluate communities' rights to territory. Moreover, they offer to communities a way to make their narratives and their interests commensurable to those of others, making their demands not "isolated from reality."¹⁰

When social norms meet the requirements of legitimacy they establish on the community that upholds them claims that others refrain from interfering with the community's freedoms to use a territory and immunities against others' powers to impose territorial jurisdiction there. Legitimacy also provides a tool to critically reform social norms, which must approximate as far as possible a sufficient level of protection of individuals' ability to form and pursue their life plans. LBC points towards a system of social norms that is somehow impartial, in the sense that all individuals subject to it should enjoy at least the same level of minimal protection of their fundamental interest in being self-governing. If norms meet the minimal requirements of legitimacy, then, we have a guarantee that they are at least minimally fair.

Moreover, whether or not individuals have a role in the identification of social norms, they will be able to evaluate the resulting arrangements with regards to how well they promote the principle according to which individuals should be free to form and pursue their life plans. A threshold of legitimacy derived by this basic and

¹⁰ Kolers, *Land, Conflict, and Justice*, 141.

widely shared principle of respect for individuals' self-government provides a reason also for the outsider to respect (and comply with) the system of entitlements of a legitimate community. The fact that outsiders can evaluate social norms also ensures that the norms are ultimately justifiable to human beings as such, without having to rely on community-specific political, cultural, or religious internal values. If the community's norms sufficiently respect all human beings as moral agents, even those who are not members have a reason to comply – as long as they also uphold the principle according to which all individuals should be treated with sufficient respect for their moral authority.¹¹

The legitimacy threshold offers two further reasons for compliance to outsiders to the social norms who are already present in the territory of the hosting community, such as travellers, refugees, and immigrants: the first one is a prudential reason and the second is an instrumental reason.¹² First, legitimate conventions offer those present in the community's territory the guarantee that they have at least their basic rights protected, given that the community's norms treat effectively all human beings with a minimal concern for their basic rights. Even if the outsider is not contributing to the determination of the system of social norms, she will still consider compliance if the norm treats her with a minimal concern for her basic rights.

Second, if the outsider has a desire to at some point join the community (temporarily or permanently), and eventually participate in the development of the community's set of entitlements, then she also has an instrumental reason to comply with the legitimate set of norms of the hosting community. In fact, well-established and legitimate practices are the first step towards progressively just forms of social cooperation because they sufficiently respect members and non-members alike as project pursuers who can determine the nature of their reciprocal relations.

¹¹ If the outsider does not believe that human beings should be treated with at least a minimum respect of their moral authority then the outsider is a fanatic. There is no normative theory that would convince him of the virtue of legitimate institutions (Lomasky, *Persons, Rights, and the Moral Community*, 56-83). The thin concept of legitimacy proposed here allows for the smallest number of fanatics-outsiders, as it merely requires that the outsider accepts a community where he himself will be treated *at least* as well the worst off member of the hosting society for what regards the protection of his own fundamental rights.

¹² The case of prospective immigrants or refugees that have not yet entered the territory of another community is not the subject of this work.

To illustrate this point, let me make a distinction between the case of the migrant, who desires to join the community, and the traveler, who's merely passing by. Let's also assume that both are reasonable people (that is, they believe that all human beings should be treated as project pursuers). The traveler will recognize the benefit of a system of entitlements that protects to a minimum standard his interest in self-government when he is present in the territory of the legitimate community. Moreover, the legitimacy of the institutions ensures that the community's norms are intelligible and justifiable to the reasonable traveler.

The case of the migrant is different as she desires to interact with the community repeatedly. In this case, I need to distinguish two situations. The first case is that of the refugee, whose original community insufficiently respects her basic demands for a legitimate system of social norms. The second case is the immigrant, who desires interaction with the hosting community because she considers it to fit better with her beliefs about justice or with her personal ends and projects.

In the first case, the refugee would be entitled to some degree to join (not necessarily permanently) the community. In fact, her original community does not respect her sufficiently as a project pursuer, and the hosting community is likely to be the most suitable community to offer her what she is owed, given that the refugee is already present in its territory. In this event the refugee has a prudential reason to comply with the set of legitimate institutions, as her situation and her membership would likely improve if she were to comply with the hosting community's social norms and become one of its members, even if only temporarily.

In the second case, the immigrant desires to join the community because she believes that the hosting community respects her idea of justice better than her original community does. Given her explicit endorsement of the hosting community's set of social norms, one can assume that the immigrant has already a reason to comply with the norms. The community is worthy of her membership and thus she likely has no reason to reject its arrangements. If she were accepted and allowed to join the community, then she would become a member and she would participate with her fellow members to the determination of the set of norms according to her sensibility.

Moreover, the reason to comply with (and tolerate) the territorial rights of a legitimate community is likely to be even more compelling if the outsider (immigrant or refugee) who wishes to be part of the community's membership is actually allowed to participate in the development of the community's social norms. In this case, the outsider would have an unconditional reason to approve of the community's set of entitlements given their correspondence to what reasonable people would uphold, and also an instrumental reason in virtue of the fact that the norms represent her interaction with the members of the community.

One may ask at this point why should the immigrant accept and tolerate the community's decision not to let her enter its territory and join the community. In section 4, I will say more about the right to immigrate that this framework is able to defend and the limits of a community's claim that others do not enter its territory. For now and in short, the immigrant has no claim that the hosting community allows her to acquire membership because she enjoys the protection of her basic entitlements in the community to which she already belongs. For this reason she might regret that the decision of the hosting community goes against her interests in improving her conditions, but her fundamental interests continue to be protected by her original community.

3 The Requirements in Detail

In this section I give details of the requirements that a set of social norms must fulfill to be legitimate. These are requirements that do not force liberal principles onto other communities, but that serves as a set of proto-liberal conditions for social arrangements that are meaningful and acceptable to liberals and non-liberals. According to these standards, liberals can evaluate the normative strength of the territorial titles produced by illiberal societies.

Although legitimacy in LBC is a certain liberal interpretation of the answer to whether a system of social norms can be considered having normative force, the requirements of legitimacy do not demand that the order under scrutiny protects individuals as equal moral agents. For LBC social norms are legitimate if they

respond to the basic legitimacy demand, which requires that the order is accepted by most of its subjects, that it is not continuously on the verge of revolution, and that the acceptance of the system of norms is somewhat genuine. The genuineness of individuals' acceptance of the particular political arrangements will be a function, among other factors, of how stable their acceptance is in the face of influence from outsiders.¹³

I believe that some conclusions can be drawn from the advancements of studies in political economy, sociology, and socio-legal studies in support of some proto-liberal set of requirements that allow us to evaluate whether the social norms examined can be said to be the product of legitimate political order, or, instead, if they are the product of domination. For political arrangements not to be merely devices to sustain the domination of the most powerful actors within a community, individuals' moral agency must be protected in some way.

LBC's four requirements of legitimacy are intended to be one plausible way in which a legitimate community may look like, on the basis of what we know about the conditions that make a community sufficiently free, adequately prosperous, and for the most part able to sustain growth and meet its members basic needs. The requirements are to be understood as parts of a composite concept of legitimacy. It is not necessary that the community scores meets all the requirements in the same way, or performs very well with regards to either one of them in particular, but it is necessary that over all the community is able to sufficiently respect individuals as project pursuers. For example, if a community is particularly good at addressing its members' needs, but is not very good at protecting their basic economic freedoms, it could still meet the threshold of legitimacy, as long as the balance between the two variables is sufficiently positive in favor of individuals' rights to be self-governing. The extent to which a community meets these requirements is ultimately an empirical question, but the next subsections will offer some guidelines for evaluation.

If a community's social norms do not achieve the minimum requirements of legitimacy they do not establish exclusive rights to territory. The community, in this case, may not demand a claim that others do not interfere with its use of a resource,

¹³ Williams, *In the Beginning Was the Deed*, 6.

or an immunity against others' overlapping jurisdictional powers within and regarding the same territory that the community occupies and controls. The inability to fulfill the requirements does not entail that the community may not continue to use and control its territory, but it means that the community's use and control of resources and territory is vulnerable to others' attempt to reform, curtail, and interfere with it.

3.1 *Basic Needs*

Social norms are legitimate if they provide for the sustainable satisfaction of basic needs such as housing, nutrition, water, health, and basic education. The provision of basic needs ensures that members of a group do not suffer deprivation to the extent that they are led to accept arrangements that are in important ways suboptimal. When people have access to the satisfaction of their basic needs and do not suffer from the violation of their most fundamental interests, they will be less likely to acquiesce in detrimental systems of social norms. The satisfaction of basic needs is important for this theory because it ensures that individuals can at least consider the possibility of dissenting to existing social norms and against existing powerful elites, and that they are not preoccupied daily with the struggles demanded by extreme poverty and poor health.

Basic education should be counted among the basic needs. It is now matter of common knowledge that basic education is highly beneficial for the prevention of diseases, the reduction of child mortality, and demographic control for a smooth transition from high birth and death rates to low birth and death rates. This has consequently positive effects on the wellbeing of the whole population and the maintenance of a sustainable economic growth. It has also been linked with impact on democracy, human rights protection, and non-violent political stability.¹⁴ This does not mean that the community needs to support a system of public education, but it requires that the level of wellbeing of its people is one that allows them to

¹⁴ "Education for All: Global Monitoring Report" in *Unesco Publishing*, 2015 (<http://unesdoc.unesco.org/images/0023/002322/232205e.pdf>).

form communities that are forward-looking and are concerned with education and training.

The ability of a community to meet its population's basic needs relies on many factors, which depend in important ways on its social arrangements. The fundamental interest that individuals have in nutrition, for example, can be met only if the community has provisions for a sustainable use of their land and their resources, or, if resources are scarce, if the community is able to develop systems of solidarity and support for those who cannot provide for themselves. For example, in informal settlements in Haiti some communities of thousands of people have started rebuilding their lives in areas where the earthquake had destroyed the previous settlements. Within these settlements different communities have emerged that have substituted an ineffective state and have overcome a series of inefficient international programs for development of post-natural-disaster areas.

The interesting bit of this otherwise tragic story is that these communities have established a functioning set of social norms that regulate urban planning, social security services, implementation of new infrastructure projects, and housing and land development. The rebuilding of new communities has followed a path of social cooperation and inclusion of each member of society, led by local experts in the field of urban planning, economic planning, civil engineering, and so on.¹⁵ These measures have tackled a situation of emergency and poverty that is relatively exceptional. However, this gives us an interesting example of the spontaneous emergence of social arrangements that display some concerns for the weaker parts of society by providing help and assistance to those deprived of homes and jobs. This is an example of a community that has been able to establish some robust entitlements to territorial jurisdiction in the areas that they have occupied.

These societies have also taken steps to ensure the sustainability of their system of cooperation. For example, they put in place a system of division of labor and training programs, and a system of economic and urban planning, which show concern for the long-term effective functioning of their common activities. The sustainability of

¹⁵ Angela Sherwood et al., *Supporting Durable Solutions to Urban, Post-Disaster Displacement: Challenges and Opportunities in Haiti* (Washington DC: The Brookings Institution and the International Organization for Migration, 2014).

the provision of basic need depends, however, not only on the management of the human resources, but also on the management of the natural resources supporting human activity. For this reason, for example, an agrarian community that was exploiting its fertile camps to the point of depletion might be liable of not having a sustainable plan to fulfill its member's basic needs of nutrition, health, and the prosperity needed to ensure basic wellbeing.

Environmental concerns should also be considered when judging whether a community is legitimately exercising its entitlement to territory. So for example, imagine the emissions from the combustion of a great amount of carbon was proven to pollute a region so profoundly to render it dangerous for human life. In this case, one could say that the way the community is exploiting its natural resources undermines the legitimacy of its social norms, since it puts at risk the health of the community's members. This means that they do not have a claim that others do not interfere with the use of their deposits of carbon.

Another case in which a community's norms are not legitimate is when some of its members are systematically and continuously oppressed or mistreated. An example can be the practice of female genital mutilation and male circumcision by many communities in Africa. The Masai of Kenya and Tanzania offer an interesting example of a community that has been entitled to some territorial rights in virtue of historical injustices. However, the community practices female genital mutilation, which have proven debilitating to the extent that the people subject to them often develop long-term illnesses that make their lives considerably shorter and painful.¹⁶ In these cases, the group upholds social norms that violate the basic interest of their people in health and a reasonable level of wellbeing. This should count as an oppressive practice that erodes some legitimate rights of the group to the exercise of territorial jurisdiction to the extent that they sustain inadequate practices.

¹⁶ If the harshness of these practices weren't enough to show that the community does not represent sufficiently its members' interest, the fact that the members of that very community oppose them should add to their rejection. Agnes Pareyio is among the most notable activist, receiving recognition from the UN with the UN in Kenya Award in 2005 (*UN in Kenya Award Winner*, United Nation Center in Nairobi, <http://www.unicnairobi.org/UNPOY.asp>).

3.2 *Personal and Economic Freedoms*

Individuals should enjoy personal freedoms and discretion on how to exercise what is generally referred to as basic economic freedoms to actively pursue the protection of their non-fundamental interests. Personal and economic rights protect individuals as project pursuers by ensuring that they do not depend on powerful others in pursuing their life plans. Undoubtedly individuals depend on each other for the successful pursuit of their interests. We rely on a complex system of division of labor to advance complex personal goals and we associate with others for the achievement of social goods. The very possibility to form and pursue life plans depends on our ability to form stable expectations regarding others' behavior. This being said, persons should not be in a situation of depending completely on one another, without the opportunity to exit or modify their relationship of mutual dependence. If one depends completely on another for the pursuit of her life plans, we have reason to believe that one will neither conceive nor voice her disagreement with the other's behavior.

The provision of basic economic rights is also necessary to allow individuals to exercise their moral authority to be authors of their lives. Being free to provide for themselves and to make plans to pursue one's prosperity allows people to follow their aptitudes and use their abilities best, increasing their chances of success. Basic economic rights protect individuals' autonomy, enhancing their opportunity to act autonomously and to successfully provide for themselves and their families. The better people do for themselves and for those they care for, the better their community will prosper and increase the level of wellbeing of its members.

Different types of arrangements can achieve the protection of an individual's domain of basic freedoms. A system of basic income might set a threshold that allows every member of the community to enjoy some independence. Similarly, the provision of social services that ensures that the benefits of social cooperation is distributed to those who lack the means for their own independence will achieve the same purpose. It is likely that every system that protects individuals' minimal domain of freedoms and independence from others will allow them to hold private property, at least with regards to personal goods. Under such a system, individuals will also be able to form associations to assist themselves in the pursuit of their plans. They will be able to

form families and manage their family's economic activities independently, ensuring that each member of their family or narrow community is free from need and able to cooperate with each other. Individuals are not all well informed nor can they ever be, but they are the most informed with regards to what is important to themselves and the people they care about.¹⁷ Individuals must be empowered to pursue independently the solution of their problems as much as possible, given that they have a better understanding of their particular needs.

For this reason, legitimate sets of social norms will also not discriminate on the basis of gender in the provision of basic personal and economic freedoms. Some empirical studies have shown that in developing countries the biggest obstacle to widespread access to clear water and to the improvement in the population's health is women's lack of economic rights. In many African countries the vast majority of the farming population are women,¹⁸ and the exclusion of women from the management of property due to gender-based discrimination has importantly hindered the development of the affected areas, reducing the ability of a community to meet its members' basic needs and to allow them to pursue their goals.¹⁹ The main reason why women's access to property rights determines a higher success of the local areas' development resides in the fact that women, by being the ones who traditionally manage the family economy and handle the family's nutrition, are also the most knowledgeable about, for example, how to handle clean water and food to avoid the risk of it being spoiled. By protecting basic property rights for both genders these communities' norms may successfully allow their members to provide for themselves and their families, and to have a genuine shot at pursuing their goals.

3.3 *Freedom of Expression*

For social norms to be legitimate individuals' freedom of expression must be tolerated. Some form of public participation in shaping the social arrangements to

¹⁷ Mark Pennington, *Robust Political Economy* (Cheltenham: Edward Elgar, 2011), 72.

¹⁸ "Agriculture in Africa," UN NEPAD Transforming Africa (2013), <http://www.un.org/en/africa/osaa/pdf/pubs/2013africanagricultures.pdf>.

¹⁹ "Empowerment of Women in Higher Education in Africa: The Role and Mission of Research," *UNESCO Forum, Occasional Paper Series Paper no. 11*, <http://unesdoc.unesco.org/images/0015/001510/151051eo.pdf>.

which individuals are subject must be allowed, free access to free information is in some way protected, and the governing elite is in some way accountable for wrongdoing. This guarantees that the people subject to a system of social norms are able to voice their dissent and to be taken seriously when they propose the revision of the norms that they find unacceptable. Many arrangements can be made for the protection of freedom of expression. In a liberal democracy the classic guarantees are freedom of the press and the right to vote and to participate in the political aspects of their membership.

In populations where liberal democracy is not the preferred system of organization, freedom of expression can be protected indirectly by tolerating forms of dissent, like allowing public speeches to organized collective action in the form of protests, social movements, and associations. In all these cases, there is a need for the widest amount and diversity of information within a community, and an assurance that people are not silenced if they express dissent. If information circulates freely and widely, it is more likely that the members of a community will be able to know the details of the existing system of social norms and assess its effects on their lives. Together with a provision for basic education, this requirement ensures that a population is able to voice but also to conceive of dissenting and critically reforming the status quo.

Freedom of expression is particularly valuable if it has some consequences on reshaping the system of existing social norms. For this reason, together with some system of free circulation of information, a community should also develop some provisions for non-arbitrary government. In particular, the expression of dissent should be structurally included so that people's dissent is not effectively ignored. In other words, freedom of expression must be tolerated and protected to the extent that it may offer an effective tool towards the reformation of social norms. Social norms ought to be in some sense responsive to its subjects and thus not be determined by the consistent and systematic control of oppressive classes. For this to be possible, the community should develop some system of accountability of the governing bodies. Liberal democracies rely on the doctrine of the rule of law, but a smaller local community could express the ideals of the rule of law by, for example, developing some norms for the fair adjudication of disputes, by realizing ideals of

impartiality and generality, and by promoting systems of balances and checks on the governing bodies.

So for example, imagine that a racist group in a remote rural area in the United States contests the fact that the current president is black. Consider also that this group internally is able to accommodate diversity by treating black people with sufficient respect regardless of the fact that they believe that they should not be able to hold office. Consider also that in this community, there is no restriction for black people to exit the community, and that they are able to express their dissent with the racist social norms upheld by the community and to form their own political and cultural associations. For LBC this group may be considered holding legitimate social norms because it does not excessively deprive its members of the basic economic and social rights that they need to be sufficiently respected as project pursuers.

Do these people have effective freedom of expression regarding their views on the unsuitability of a black president? As they belong to a community upholding a democratic electoral system, they may not successfully reject the authority of the laws passed by the federal government unless the majority of people agreed with them. As I discuss in the next chapter, such group may legitimately secede, given that its social norms are sufficiently legitimate. However, secession may not be the group's aspiration as its members may regard the benefit of successfully rejecting a black president not exceeding the costs of secession. However, some territorial rights may be recognized. For example say that this community celebrates the historical battles of the civil war in which the separatists were successful, and that the presence of dissenting civil rights activists during these celebrations limits the groups' ability to properly honor its cultural and historical heritage. Regardless of how despicable their beliefs may be, they may be allowed for example to claim that no one enters or modifies the memorial grounds of their heroes without their consent.

An important ability that freedom of expression pursues is also the freedom not to express one's views about the existing social norms and not to participate in the activities of a community. If individuals find it meaningful not to be implicated in a system of norms, and wish not to participate to the collective activity of norm formation, they should be allowed to do so. Take for example the Italian Fascism, where participation was forcibly imposed on the population. During elections in

Fascist Italy, people were forced to vote in favor of the Fascist party. The Fascist party wanted to promote the perception that it had very high public approval. It wasn't enough to win the elections, as winning elections with the approval of a small percentage of the population would have eroded the perception that the Fascist party was the most widely appreciated political party in the Italian government. Aside from the problem of forced compliance, this practice is problematic because it fosters a false representation of the preferences of a community, which partly is the reason why suboptimal social norms can arise and be sustained in time, even when the majority dissents.²⁰ A sufficient protection of freedom of speech reduces the risk that bad norms emerge or pass the test of time.

3.4 *Freedom of Association*

Freedom of speech and personal and economic freedoms are instrumental to permitting people to participate in shaping the social norms to which they are subjects. This aim may be achieved by a diversity of combinations of freedom of speech and personal and economic freedoms. However, also freedom of association plays an important role in protecting and promoting individuals' ability to shape their relations and the rules to which their society abides. Thus, individuals' freedom of association must also be respected for norms to be legitimate. Individuals should be reasonably free to choose to associate with the people they prefer and to join forces in the pursuit of common interests.

Freedom of association also implies that one should not be implicated with a collective project that one doesn't agree with. Freedom of association comes, thus, with a provision for freedom to exit an association. Since social norms are the product of individuals' interactions, and the identity of the members of a group

²⁰ Imposing social participation increases the chances that a community will suffer from 'pluralistic ignorance,' where individuals mistakenly believe that their own private thoughts and preferences are different from those of their fellow members of society (Bicchieri, *The Grammar of Society*, 186). When this happens, the chances that suboptimal norms develop and survive the test of time are significantly higher. Bicchieri offers a (non-exhaustive) list of unpopular arrangements and explains how a loud minority is able to protect suboptimal social norms by reducing accessibility of information and misrepresenting social support for unwanted social norms. Some examples of unwanted social norms: norms of discrimination against minorities, norms of revenge popular in the Mediterranean countries, corruption, gangs' violent behavior (Ibid., 179).

affects importantly the nature of the norms that the group will develop. For a system of social norms to be legitimate, the decision of some members to exit the community and its system of norms should be tolerated. For this reason, the proposed theory defends a relatively tolerant approach towards secession and political devolution, suggesting that anyone should be able to freely choose the type of community to which one would like to belong. This does not mean that anyone should also be able to join any community: freedom of association defends the freedom of a community to exclude some from membership. It does, however, suggest that anyone should be able to disengage from the community to which he or she belongs if he or she desires to do so.

Freedom of exit also allows individuals to voice their dissent when other avenues are impracticable. The threat of exit has been considered traditionally inimical to beneficial social cooperation and to poison relations between groups subject to the same institutions.²¹ However, it is often the case that exiting a community may require a great cost for those who decide to leave. Leaving one's community is difficult, and when individuals choose to distance themselves from their original community, they are likely to do so because they believe that it is a much greater cost to continue cooperation under the current system of norms. Individuals may exit an association by emigrating or seceding. Both options require that the exiting groups or individuals incur costs that are very high.

Those who exit an association will likely have to renounce a familiar culture and incur the costs of relocation and adaptation, including the fact that the new environment may be unfamiliar and difficult to navigate. The remaining members of society, on the other hand, will have to establish new systems of organization that take in consideration the loss of part of their original membership. It is likely that those who want to exit will first use the threat of exit before they actually part from their original community, in particular in the case of secession.²² For this reason, a community that has weak provisions for freedom of expression may demonstrate that it meets the requirements of legitimacy if, for example, it allows its members to exit their community without incurring great costs.

²¹ Buchanan, *Theories of Secession*, 48-49.

²² Like for example in the case of Catalonia and Quebec.

One of the costs that groups of people exiting their original association will incur is that of finding another territory to settle in or another association to join. Thus communities that restrict freedom of expression may be considered holding legitimate social norms if their members have a realistic option of exercising their freedom to exit. If the international community is itself composed of legitimate communities, then individuals' choice to exit may be easier to pursue.

So for example, a homogenous society such as the Amish community that demands that all its members share the same cultural and religious values, may still uphold a system of legitimate social norms given their vicinity and good relations with the larger community of the United States. This vicinity allows members of both communities to interact with each other and to exit and enter the different communities at no unbearable cost for themselves. Communities, thus, have a further incentive in wanting to be part of an international system of legitimate communities. In fact, if their members enjoy a wide set of freedoms within the various existing communities, including the freedom to enter other associations and associate with whomever they want, then their original communities may be able to shape the terms of their cooperation more freely. What matters is the overall level of freedom that their members enjoy, which does not necessarily depend only on the level of freedom that each separate community provides for their members.

4 Global Order

The justifiability of the system of entitlements of a community on the basis of the fact that they respect a minimum account of legitimacy offers one reason for other communities to respect it as well. The fulfillment of the requirements of legitimacy is a sign that the community's norms are at least acceptable to reasonable persons who are subject to them. This allows other groups to recognize a community as one that has a legitimate authority regarding its territory and whose authority enjoys some type of internal stability.

LBC offers reasons to both liberal and illiberal communities to comply with the requirements of legitimacy and the system of mutual recognition of legitimate

communities. For illiberal societies, the system ensures that their rights to their territory on the basis of their particular system of values and beliefs are respected, even if they do not respect the more demanding standards of liberal legitimacy. For liberals, the system of legitimacy offers the guarantee that the communities participating in and complying with it sufficiently respect individuals as project pursuers, ensuring that their relations with these communities do not violate the liberal commitment to individual self-government. Moreover, the minimal nature of the requirements of legitimacy is consistent with liberals' commitment to peace and stability, and with their commitment to tolerating decent non-liberal societies.

The requirements of legitimacy also indicate the scope of communities' exclusive entitlements to territory. For LBC, when a community upholds legitimate social norms it acquires claims that others do not interfere with the use of its territory, and immunities against others' overlapping territorial jurisdiction only to the extent that these claims and immunities are needed for the protection of the legitimacy of its norms. Above the protection of individuals' interest in being project pursuers, the community enjoys only a freedom to use and a power to control the territory that is at the center of its members' other important interests. When their freedom and powers conflict with those of others, the parties acquire a duty to compromise, given that their freedoms and powers protect incommensurable but relevant interests.

According to LBC, then, Turkey, as well as the UK, Russia, and Greece, may permissibly demand exclusive control of Cyprus if and only if the jurisdictional control of the whole island (or of the contested North side) were necessary for either community to keep ensuring the minimal standards of legitimacy. Such relation with the territory of Cyprus would be quite difficult to demonstrate, considering also that currently neither of them controls Cyprus exclusively and yet is able to ensure sufficient internal standards of legitimacy. In this situation, the four countries may acquire exclusive rights on the island only if these entitlements are defined by a compromise that ensures that all the interested parties discuss the importance of their interests and evaluate others' demands. The parties that can participate in the compromise are those who have an existing interest in the territory, the satisfaction of which may not be attained with the control or use of any other territory or resource than that currently contested.

Such compromise will have to include the communities with an interest in the territory at issue and will have to consider that the resulting entitlements' scope must not infringe the Cypriot's territorial rights that are essential for their system of norms to meet the requirements of legitimacy. In the example of Cyprus, such compromise will likely not result in any rights of the Turkish government to expropriate and relocate the population occupying North Cyprus or powers of the Greek military forces to change the government of the island. However, Turkey and Greece may participate in the compromise on the basis of their current presence in the territory and their existing interests that depend on its control. It is likely that, on the other hand, Russia and the UK may be able to assert their international presence through the control of other territories and not necessarily through the control of Cyprus. If that is the case, the two countries may not participate as parties of the compromise. Their option is to negotiate with the rightful holders of territorial rights for the permission to carry on their activities there.

The compromise will have as object all territories and resources that the communities do not hold exclusively, and thus that do not constitute the necessary basis of the legitimacy of their political arrangements. To the extent that interests that go beyond the protection of legitimacy are important to the communities, they will have to be taken into consideration when pursuing a fair compromise. This is also true when the communities' political arrangements do not meet the requirements of legitimacy. In this case, the illegitimate community enjoys only freedoms to use and control the territory to which it has access but may still participate to the negotiations. However, given that they do not hold exclusive territorial rights, others may freely interfere with the control and use of their territory, as long as their interference does not create the conditions for internal violence and social unrest.

Those who wish to interfere with the use of illegitimate communities' territory have a duty towards the members of those communities to respect their freedoms and powers regarding territory and their system of social norms only to the extent that these norms offer some alternative to violence and chaos. In fact, others' interference with illegitimate communities' territorial holdings should not hurt the

chance that the occupying population may have in establishing legitimate social norms.

LBC also allows communities to enforce to a large extent the policies that they see fit, including policies that restrict immigration. If individuals enjoy the protection of the original community's legitimate set of entitlements, they have no legitimate demands to exclusively use or enter other communities' territory on the basis of their interest in being treated as project pursuers. The basic international structure of entitlements that emerges from the mutual recognition of legitimate communities offers each legitimate community a higher degree of control of their territories.

In fact outsiders have a duty to respect a community's internal system of property rights, given their duty to respect other individuals' reliance on stable expectations, including those that derive from the stability of possession. The duty to respect existing arrangements is derived from the paramount importance of peace and order, which are necessary for the development of legitimate social norms. If the community upholds legitimate social norms, then the duty of immigrants to respect the existing system of rights correlates to the community's claim that others do not disrupt the system of norms to the point that it will be difficult for the community to meet the requirements of legitimacy. This may allow the community to enact immigration policies that restrict the rights of outsiders to enter the territory, or to settle within the community, to avoid sudden and radical change to the community's social and political arrangements (such as, for example, their reliance on national health systems or measures in support of unemployment).

Outsiders and insiders may thus have overlapping and, possibly, conflicting freedoms: the former may have a freedom to enter the territory and make use of it. Members of a community on the other hand may make it harder for outsiders to enter and use their territory, for example by imposing demanding standards to become members of their community or citizens of a state. On the other hand, outsiders are permitted to sneak in the territory of the community and trade with members individually, or marry them, or advocate and promote their ideas among them. The community would also have to eventually protect the outsiders' freedom to occupy and reside within its territory once they had acquired special interest in its territory by, for example, marrying one of the members of the community, or buying

property there, or working there. Outsiders in fact have no duty not to enter the community's territory, as long as their presence there is not a threat to the community's legitimate system of social norms. To establish any claim and immunities against conflicting freedoms and powers, the parties will have to settle for some agreement that ensures that both significant interests in the same territory are protected.

If a community's conventions do not fulfill the legitimacy requirements, the group holds freedoms to use and powers to control the territory to which they have access that are, however, not protected by a claim that others do not interfere or immunities against competing powers of jurisdiction. Outsiders continue to have only a freedom to enter and use the community's territory, but their freedom is more extensive as their concern must only be that of maintaining peace and stability. However, outsiders do not acquire an exclusive right to the territory of illegitimate communities or to the territory of legitimate communities that is not necessary for the protection of legitimate institutions. They merely have no duty not to enter the community's territory or use their resources. To resolve conflicts arising from incompatible freedoms held by outsiders and the community, the parties will have to agree on mutually beneficial arrangements regarding the territory on which their interests and practices impinge.

If non members rely on the community's territory for the pursuit of their directive plans, they may have a freedom to enter that is as strong as their interest in it. There is a presumption, however, that the occupying community's interest in that territory is stronger as it approaches the threshold of legitimacy. Its members, in fact, plausibly rely on that territory for their directive plans more significantly the more they enjoy a freedom to form and pursue directive plans. For example, imagine I want to pursue a career in waterskiing and that to do that I must move to a coastal country. I have an interest that justifies my freedom to move to another country, but my interest may be overcome by the fact that the community I want to join is unable to welcome me without having to radically compromise the wellbeing of its members, given that the fishing activities of that community are incompatible with waterskiing activities. Those particular shores, moreover, are not necessarily the only coasts on which I can further my interest in waterskiing. Differently, the

community's activities impinge on that specific coastal area, given that successful fishing requires familiarity with the fishing areas. In this example, provided that it upholds legitimate norms, the fishing community's interest in continuing its fishing activities will overcome the interest of water-skiers and establish exclusive titles to use and control those coasts upon the members of the community.

LBC, with its minimal requirements of legitimacy, allows communities to participate in a system of international cooperation that permits the establishment of rights on territory on the basis of diverse interests that represent in different degrees communities' special interest to territory. In fact, communities may protect and further interests that are not limited to those necessary for the protection of minimal standards of legitimacy as long as they concede to their duty to compromise, and as long as they respect their duties of assistance towards individuals that are not present in their territory and do not have their basic interest protected.

In some cases, in fact, even those who are not present in a territory and do not have a special interest in it, may still have legitimate demands on the benefits arising from its use and control. Consider the case of environmental refugees who may not enjoy residency in their community's original territory because of some natural disaster, or the case of refugees who are forced away from their home by oppressive regimes. These people are left outside the system of protection of their basic rights, and do not enjoy minimal respect for their interest in being treated as project pursuers. For this reason they may have claims that other communities assist in the satisfaction of their basic needs and demands.

These claims may not necessarily be rights to immigrate – in the case of refugees – or to use and control a territory – in the case of environmental refugees. Unprotected individuals and groups may demand that others assist in providing help and resources in establishing the conditions leading to legitimate social orders elsewhere; this may come in the form of providing assistance in the development of norms and institutions within an uninhabited territory, or assistance to the community that is hosting and integrating displaced individuals within their membership. A theory of territorial rights is not enough to establish who should provide such aid and who holds duties of assistance. Determining this would require an account of duties on the basis of more demanding requirements of global justice. I suppose that these

duties will have to be shared fairly among those who enjoy the protection of their interests within legitimate communities and proportionally to their wellbeing and their ability to offer aid.

LBC is consistent with a theory of global distributive justice also with regards to resource rights. Communities upholding conventions that impinge on particular natural resources can exclude others from the enjoyment of those resources only to the extent that such exclusion is necessary for the preservation of a threshold of legitimacy. Above that threshold, they have only unprotected freedom and powers that are grounded on their special interests on those resources. Because of these existing but unprotected freedoms they can participate in the compromise for the establishment of exclusive titles on contested resources. Imagine, then, that Norway needs only 70% of its oil to protect the legitimacy of its social norms. It seems that for LBC a country like Puerto Rico could go to the North Sea and start extracting the remaining 30% of the oil currently controlled by Norway, even against accepting a duty to compromise with the Scandinavian country.

However, for LBC, also international practices and conventions must be considered grounding titles, just as much as local and national practices. The international community upholds an established practice supported by the principle according to which the resources of a country belong to the people of that country.²³ This practice serves an important role in maintaining international peace, protecting the fundamental interest of individuals in being able to form and pursue life-plans. However, like other conventions, also the norm of popular sovereignty is limited to the role it serves, and demands compliance only to the extent that it is legitimate. The norm of popular sovereignty of natural resources may be enough to ensure that Puerto Rico does not sail to the North Sea and take Norway's oil, but it does not make Norway invulnerable to the demands of global distributive justice. So for example, depending on what theory of global justice we support, Norway may have to devote the revenues of the surplus 30% of its oil to alleviate the problems of the global poor by, for example, complying with a global tax. Even if the international community upholds a system of conventions that is unjust because of it does not

²³ Leif Wenar, "Property Rights and the Resource Curse," *Philosophy and Public Affairs* 36, no. 1 (2008), 2-32.

sufficiently address the injustice of global poverty, LBC urges the members of that community to look at the possible piecemeal improvements that can be carried out, without disrupting the present achievements in international relations that secure some level of legitimacy.

This approach settles very few exclusive rights to territory and resources, leaving the determination of most exclusive territorial rights to the compromise between interested parties and to the balancing of important interests in contested territories. This is true, as I tried to show in this section, for freedoms to access and occupy a territory, freedoms to use and manage resources, and powers of jurisdiction regarding territory and resources. By focusing on the need to find agreement on the normative incidents that protect important but non-fundamental interests, LBC promotes exchange, dialogue, and cooperation between parties that share legitimate freedoms to use and powers to control the same territories.

The focus on agreement and compromise is likely to translate into the involvement of third parties, such as international organizations or non-governmental authorities to aid the parties in finding mutually agreeable terms, and to achieve a mutual understanding of their reciprocal duties. In the following chapter, I discuss the issue of secession and offer a particular example of how LBC addresses conflicts over territories.

Chapter Seven - Secession

1 Introduction

In this chapter I apply LBC to the case of secession. A theory of territorial rights should be concerned with secession because secession is largely a territorial phenomenon. To secede a group must necessarily hold titles to control the territory that it asserts as its own and to use and manage its resources (at least partially). Without territorial rights, in fact, the group that desired independence could not be said to have seceded.¹ Surprisingly little has been said about the implications of theories of territorial rights for the separation of states. Much of this silence has to do with the fact that territorial rights are a new subject in political philosophy. But the oversight of secession in the literature about territorial rights is also associated with the widely held assumption that a state's territorial rights come with its sovereignty, and thus with its legitimate exercise of jurisdictional power over its members without interference from outside sources of political authority or influence. The modern state is understood as principally a territorial entity, and philosophical arguments in favor of statehood have been classically taken also to justify territorial control. Sidgwick writes for example:

it seems essential to the modern conception of a State that its government should exercise supreme dominion over a particular portion of the earth's surface ... Indeed, in modern political thought the connection between a political society and its territory is so close that the two notions almost blend.²

Similarly, in international law the state is defined as a territorial entity:

¹ Lea Brylmayer, "Secession and Self Determination: A Territorial Interpretation," *Faculty Scholarship Series*, Paper 2434 (1991) 191.

² Sidgwick, *The Elements of Politics*, 221-222 as quoted by Simmons, in Simmons, *On the Territorial Rights of States*.

The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.³

However, full control over territory and its resources is not necessarily entailed by the concept of sovereignty. Sovereignty is divisible, and its parts can be assigned to different agents.⁴ As many have illustrated, the concept of sovereignty and the powers that come with it have changed in the past and will continue to change in the future.⁵ Thus we cannot rely on it to define the rights of state, but we must understand it as the achievement of a thorough and systematic justification of its constituent normative incidents.⁶

Sovereignty in international law refers to four distinct and independent features. The first, international legal sovereignty, refers to the practice of mutual recognition between territorial states that have formal juridical independence. The second, the Westphalian sovereignty, refers to the state's right to exclude foreign interference within a territorial domain. The third, domestic sovereignty, refers instead to the state's ability to exercise effective control domestically. Finally, the fourth, the interdependence sovereignty, indicates a state's ability to regulate the flow of people, goods, capital, but also information, ideas, and pollutants across their territorial borders.⁷ This list exemplifies the complex array of rights and abilities that must be assessed to evaluate the degree of sovereignty that any given state enjoys. The justification of territorial rights and the scope of states' titles to resources and land are only two parts of the justification of full sovereignty, which cuts across the four features listed above, and includes other normative incidents besides territorial jurisdiction regarding territory and resources, such as the right to internal and external self-determination, the power to make treaties, the right to make war, and the right to legislate and enforce rules over people within a particular territory.⁸

³ Seventh International Conference of American States (1933), "The Inter-American Convention on the Rights and Duties of States (The Montevideo Convention of 1933)," Art. 1.

⁴ Carmen Pavel, *Divided Sovereignty* (Oxford: Oxford University Press, 2015).

⁵ Buchanan, *Justice, Legitimacy, and Self-determination*, 50, 57; Hart, *The Concept of Law*, 50-78; Neil McCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 123-136.

⁶ Simmons, *On the Territorial Rights of States*, 301 n4.

⁷ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 3-4.

⁸ Buchanan, *Justice, Legitimacy, and Self-determination*, 263.

With regards to territory in particular, insisting that sovereignty grounds territorial rights, and not the other way around, overlooks the fact that the acquisition of territory determines the exclusion of other national groups and their members from the enjoyment of objects of fundamental importance for national self-determination and prosperity. Just like in the case of property, taking control of a territory and its resources has implications on the acquirer, but also on those who are excluded from successive acquisition of the same particular resources. So when we ask whether a group can secede from a state and exert territorial jurisdiction in the land that is controlled by the existing state we need to ask whether the group can legitimately acquire the territory it asserts as its own, whether this acquisition violates any existing titles to the same territory, and what are the limits to this appropriation.

The disassociation of the state's sovereignty from permanent sovereignty over territory and resources has been discussed recently in the literature on natural resources and global justice. Armstrong for example convincingly argues that full sovereignty over resources is not entailed by the state's sovereignty and jurisdictional powers over people. In particular, he runs through some of the strongest cases in favor of statehood and resource rights and concludes that arguments from national improvement, attachment, or functionalist principles linking territorial rights to key state functions, all fail in supporting robust territorial rights.⁹

For example, supporters of liberal nationalism argue that national communities have invested care and energy in developing a land and its resources, adding value to the territory. Moreover, national communities develop significant attachment to the land that they occupy and improve, making those particular territories an integral part of their members' identity. Because of the value that national groups have added to a particular land, and because of their attachment to it, supporters of this view argue that national groups should enjoy extensive and robust rights to the control of natural resources, and that they should be able to exclude others from interference with their use of these resources.¹⁰ An alternative argument in favor of sovereignty over resources and territory is the functionalist argument, according to which the value of effective states and political institutions resides in them being able to secure

⁹ Armstrong, *Against Permanent Sovereignty*, ?.

¹⁰ Miller, *National Responsibility and Global Justice*, 204; Meisels, *Territorial Rights*, ?.

for their subjects the protection of basic rights and the satisfaction of basic needs. Functionalist arguments hold, then, that in so far as states are able to secure these basic benefits of cooperation, we must accord them control over their territory and resources.

However, the liberal nationalism and the functionalist arguments fail to prove full sovereignty over territory, and they are all instead compatible with limited control over land and resources.¹¹ With regards to the improvement argument, it is not clear why the fact that the national group has added value to the resource gives the group full property and control over the whole resource and the territory in which it is found. More convincingly, adding value to a territory may yield to a right to a part of the proceeds from the sale of resources or to a right to other types of income deriving from their use, but not necessarily to a robust and exclusive right to control and exploit them and to exclude others from their enjoyment.¹²

Moreover, Armstrong argues that if the valuable function of the state is the satisfaction of basic needs and the protection of basic rights, it is unclear why states have a robust right to territorial control and to the use and exploitation of all resources found there, and not only those rights that are necessary for the efficient and effective realization of the aims of political institutions.¹³ On the other hand, the liberal nationalism argument may convincingly link only some resource rights and territorial control to a group on the basis of the special relation that the group has developed with a particular territory. However, it is often the case that a group's identity and way of life depends only on some resources and geographical areas within the territory and not on all the possible ways in which the territory can be used and controlled.¹⁴ For example, a community of fishermen may very likely have no attachment whatsoever to the oil deposits found below the sea floor. Moreover, the liberal nationalism theory is likely to support territorial rights of sub national

¹¹ Armstrong, *Against Permanent Sovereignty*, 16.

¹² Ibid., 7.

¹³ Ibid., 12.

¹⁴ Ibid., 9.

groups, which are more likely to rely on specific territories and resources than the larger political community to which they belong.¹⁵

To understand what territorial rights a state may demand, thus, we may not resort to the idea of sovereignty. On the contrary, our idea of sovereignty will be informed by our theories of territorial rights, self-determination, international relation, just war, and political authority. Given the uncertainty regarding what are the normative incidents implied by the idea of sovereignty, it is also somewhat unclear to what extent states that have successfully seceded are independent from outside interference. Here I offer a justification of the jurisdictional powers over people regarding land and resources that a group must acquire to legitimately secede. But I do not also address the immunities that the newly formed state enjoys against outside interference regarding its powers of jurisdiction over its subjects, which are part of a wider theory of political authority in general.

Secession is also a point in time when the community exercises meta-jurisdictional authority through the establishment of new institutions, and the rejection of the political authority of the existing state. The declaration of independence and the establishment of new political institutions is a turning point for the community's recognition within the international forces as an independent political unit. Before declaring independence, the community that legitimately exerts meta-jurisdictional authority is identified by its social norms, which also indicate the territory on which the community relies for the protection and development of its members' self-government.

At secession, the community revokes its support for the existing institutions and expresses its aspiration to establish a new set of institutions on the basis of its particular social norms. As I will discuss in section 4, the newly established institutions will enjoy exclusive jurisdictional powers insofar as, and to the extent to which, they represent a set of legitimate social norms and are authorized by its subjects. By the end of this final chapter I side with the voluntaristic theories, and suggest that a community can legitimately establish new political institutions if its

¹⁵ Ibid.

members consent to those institutions, and if their consent has been suitably expressed or implicated by their actions.

In my view, the question of secession is ultimately a territorial question and is independent from the question of whether the newly formed state enjoys legitimate political authority over its members. The limits to the exercise of authority over people are set by our theory of political authority, and they apply regardless of the territorial division. Our theory of political authority holds true whether the state under scrutiny is Sudan before separation, or Sudan and South Sudan after the secession of 2011. Moreover, powers over people in general do not necessarily entail powers regarding the territory that these people occupy.¹⁶ However, when a group secedes from a state, what becomes relevant is whether the seceding group has the most extensive titles on territory.¹⁷ To assess whether the group has a right to secede, then, the questions regarding the group's territorial titles must be given priority: who can control the particular territory seized, and who owns the resources within? Who can decide who enters and under what conditions?

It is possible that a group's territorial rights may include all or a combination of the incidents described in Chapter 2. I suggest that a group has a right to secede when it has at least territorial jurisdiction regarding a territory and its resources and a freedom to occupy and use the territory. When asserting a right to secede the group is also affirming the power to unilaterally establish institutions on the particular territory that it occupies.¹⁸ Such institutions exerts the group's powers to legislate, adjudicate, and enforce rules in its behalf regarding land and resources within a territory that was previously under the jurisdiction of another state.¹⁹

¹⁶ Political institutions can exert powers over subjects on the basis of their location or on the basis of non-territorial criteria. This distinguishes territorial from non-territorial jurisdiction. A classic example of non-territorial jurisdiction is the Roman Catholic Church, which can change the normative incidents of its subjects and their standing within the community, regardless of their location.

¹⁷ Wellman makes a similar argument in Wellman, *A Theory of Secession*, 37, 111 n25.

¹⁸ Brylmayer, *Secession and Self-determination*, 179. What makes secession unilateral is that a group need not have any authorization from the state to secede. The unilateralness of secession does not exclude that cooperation and compromise between the parties may be required.

¹⁹ Simmons, *On the Territorial Rights of States*, 303 and 306; Nine, *Global Justice and Territory*, 120; Stilz, *Why do States Have Territorial Rights?* 186. The right to secede can be classified as an incident of meta-jurisdictional powers.

Here I will not also examine the claim that others do not enter and occupy a group's territory, because a group may have a right to secede without having also a claim against immigration.²⁰ As discussed in the previous chapter, the right to exclude others from a territory is grounded in part on legitimate territorial jurisdiction and in part on considerations regarding global justice.²¹ The justification of the claim against others entering a territory requires, thus, a thorough analysis and a theory of global justice that falls outside the scope of this thesis.

Also, as discussed in Chapters 3 and 4, the justification of a general right to a territory is different from the justification of a right to a particular piece of land.²² A group could be entitled to control some territory or other in virtue, for example, of its interest in self-determination.²³ Although this might be true, it does not explain why the group can exercise its right to self-determination in the particular territory it occupies and from which it excludes all others.

In the next section I discuss how the existing theories of territorial rights explain and address the issue of secession. I examine territorial rights theories on the basis of the distinction between indirect and direct theories introduced in Chapters 3 and 4. The former maintain that a group has territorial jurisdiction if it holds legitimate authority over its members. Direct theories, by contrast, suggest that territorial jurisdiction is grounded on the fundamental interest of the group's members on land. By the end of section 2, I argue that direct theories are to be preferred.

In section 3, I discuss the direct theories and their shortcomings and propose LBC's account of secession as a solution. My proposal is that a group can secede and acquire protective claims and immunities with regards to its territorial rights if it upholds a system of legitimate conventions grounding territorial rights. I show that, by relying on a conventionalist approach, one is able to maintain that at the outset of secession the parties also have a duty to compromise on matters regarding the division of shared territory. The resulting theory addresses groups' conflicting legitimate interests in the separating territories, taking into consideration the existing

²⁰ Nine, *Global Justice and Territory*, 9.

²¹ Miller, *National Responsibility and Global Justice*, 201-230.

²² Stilz, *Why do States Have Territorial Rights?* 187.

²³ Nine, *Global Justice and Territory*, 70.

interdependence among individuals and their continuing need for cooperation. I also suggest that the seceding group's normative incidents include a duty to compromise with the state from which they have separated and offer some examples of how the duty to compromise should be fulfilled.

2 Indirect Theories

In this chapter I examine the implications that indirect and direct theories have for a theory of secession. Recall that the distinction between the two approaches is based on the way they justify a group's jurisdiction within a particular geographical area. For indirect theories, a group has jurisdictional powers on a territory if it holds legitimate authority over its members. Direct theories, on the other hand, suggest that territorial jurisdiction does not depend on a prior entitlement to political authority but is grounded on the members' fundamental interests on land.²⁴

Most supporters of both approaches recognize that a group's freedom to occupy and use a particular territory lies in a pre-institutional collective or individual interest, respectively, in self-determination or individual self-government. They disagree, however, with regards to the moral ground of territorial jurisdiction, which will be the focus of the remainder of this chapter. My aim is to show that direct theories are preferred.

According to indirect theories, a group can establish territorial jurisdiction within a particular territory only if it has legitimate political authority over its members. The group acquires political authority once it has established just political institutions or once it demonstrates that it is able to establish just institutions. Accordingly, a group has territorial jurisdiction within a particular territory if it has established or if it demonstrates the ability to establish just institutions there.

²⁴ The distinction between direct and indirect theories of secession adds to Buchanan's distinction between remedial right only theories and primary right theories another level of analysis: the direct/indirect distinction focuses on when the seceding group has a right to a particular territory, the remedial right only/primary right distinction instead focuses on when the seceding group can legitimately reject the existing political institutions (Buchanan, *Theories of Secession*, 34).

For example, Buchanan's legitimate state theory, Ypi's permissive theory, and Wellman's freedom of association theory suggest that a group must uphold just political institutions before it can establish territorial jurisdiction. According to Buchanan, such institutions must protect individuals' basic human rights; for Wellman, institutions must provide the benefits of political association to all its subjects. Since territorial jurisdiction is needed for institutions to effectively perform their functions, the group also acquires the right to control the territory it occupies.²⁵ Ypi proposes instead that a state acquires territorial jurisdiction only provisionally and if its institutions realize the value of cosmopolitan justice.

For Stilz's occupancy theory and Nine's collectivistic Lockean theory, on the other hand, a group only needs to demonstrate that it will be able to establish just institutions to acquire territorial jurisdiction. In particular, Stilz suggests that a group demonstrates such ability if it credibly protects its members' basic rights through the establishment of partial institutions. These may start as a 'separate dependency' of another state, until the time when they are ready to support political independence.²⁶ Moreover, a seceding group must have established a history of political cooperation in the form of a state before it can sever from legitimate institutions.²⁷

Similarly, for Nine, only those groups that have upheld functioning political institutions have a right to secede. Sub-groups that wish to secede from legitimate states ought to fulfill more demanding requirements to defeat the existing state's territorial jurisdiction. The fact that the group has been able to establish just political arrangements serves as a guarantee that it will be able to do so in the future and tilts the balance of considerations in favor of the group's right to secede.²⁸ Such

²⁵ The two theories differ in their account of the right of the group to reject the state's political authority. For the legitimate state theory, a group can secede only if the existing state fails to uphold functioning political institutions that are minimally just (Buchanan, *Theories of Secession*, 40). For the freedom of association theory, instead, freedom of association establishes a group's legitimate right to secede any time its members wish to do so, regardless of the nature of the existing institutions (Wellman, *A Theory of Secession*, 50).

²⁶ Stilz, *Nations, States, and Territory*, 594, 599.

²⁷ *Ibid.*, 591.

²⁸ Nine, *Global Justice and Territory*, 69 n64.

institutions, however, need only be local (such as municipal governments) and meet the minimal requirements of justice.²⁹

For indirect theories, territorial jurisdiction is established by “morally salient bonds between [the people].”³⁰ This relationship establishes territorial jurisdiction that binds only the parties involved in its creation. It is, thus, justified only to those subject to the group’s territorial jurisdiction. Internal political legitimacy, in fact, provides no reason for outsiders to the relevant community to refrain from using particular territories. This poses a problem for an account of the right to secede, as it does not offer a conclusive justification in favor of the group’s territorial jurisdiction and against the existing state’s competing jurisdictional powers.

For example, the Italian region of Veneto that is actively pursuing independence is able to ensure that its members treat each other justly. This, however, is not a reason for the other Italian regions to hand over a territory whose shores we have reason to believe are rich of natural gas. The importance of territorial jurisdiction for the seceding group may be a reason for others to respect its exclusive territorial jurisdiction somewhere, but it cannot justify a duty of the existing state (if also legitimate) to refrain from using the territory it still legitimately controls.³¹

In line with this, Buchanan argues that a group may never unilaterally secede unless the state to which it belongs is unjust. Ypi advances a similar view and argues that individuals have a duty to enter rightful political arrangements and that national institutions promote the Kantian principle of rights. For the permissive theory, unilateral secession from a state is a violation of the natural duty of justice, as it would lead to the temporary return to the state of nature.³² Similarly, for Ypi a group may never secede from a functioning state. As Stilz notes, however, this approach is problematic because it does not allow for political independence that seems appropriate, given the group’s history and attachment to the territory. To understand this objection it is useful to briefly examine a case that is not exclusively associated with secession. Stilz argues in this

²⁹ Ibid., 52.

³⁰ Stilz, *Nations, States, and Territory*, 591.

³¹ Advocates of indirect theories may argue that just institutions are those that are able to address competing territorial rights of minorities, subgroups, and the demands of global distributive justice. This reply, however, would commit them to endorse a much richer account of justice than what they currently propose (that is, the conditions for the protection of members’ basic human rights).

³² Ypi, *A Permissive Theory*, 299 and 307.

respect that when the USA occupied German territory following the end of the war in 1945, there was an expectation that German people would have eventually regained territorial jurisdiction in Germany. Buchanan's account, however, cannot explain this expectation, as the American institutions had exclusive territorial jurisdiction within German territory as long as their institutions continued to protect basic human rights there.³³

Similar to Buchanan, Wellman insists that a group acquires territorial jurisdiction when it upholds effective institutions within a particular territory. His theory, however, is able to address the German case by suggesting that the freedom of association of the German people overcomes their duty to respect legitimate institutions. However, Wellman's freedom of association theory fails to explain why the USA shouldn't be allowed to keep control of the German territory. The German people, in this case, would still be able to seek satisfaction of their freedom of association elsewhere – on unoccupied land or on territories ruled by an unjust state.

For Wellman, Ypi, and Buchanan, the presence of a community in a particular territory is an arbitrary fact. This, however, does not establish any normative tie between the group and the land. If territorial control of a particular land is arbitrary and contingent, it is unclear why the seceding group has a right to establish new institutions in the territory it occupies. These theories are in need of a principle that associates a group's presence in a territory with its right to rule that land.

For Stilz and Nine, on the other hand, sub-groups may permissibly secede from just states. Their accounts also explain how a group's presence in a particular territory is tied to that group's territorial rights: when a group is located somewhere it comes to be attached to that particular territory, and this grounds some rights of use and occupancy. For both theories, attachment to particular territories can be justified on pre-institutional grounds. Pre-institutional attachment is grounded on the presence of the group's members in a particular territory and explains why the group has a freedom to occupy and use that territory once it can also reject the existing institutions.³⁴ For Stilz, individuals have pre-institutional occupancy rights on a

³³ Stilz, *Nations, States, and Territory*, 591.

³⁴ Kolers calls this view of attachment the 'presence view' (Kolers, *Attachment to Territory*, 106).

territory given that their residence there is necessary to pursue their life plans.³⁵ For Nine, a group has ownership rights on a land on the basis of a special relation with that territory, which is essential for its collective self-determination.³⁶

In both accounts, attachment does not provide the ground for territorial jurisdiction, but it merely establishes that some individuals or groups have rights to use and occupy certain territories. It follows, they argue, that a group that has territorial jurisdiction can exert such powers on a particular territory if it has a right to occupy and use precisely that territory. Territorial jurisdiction, on the other hand, is acquired on the basis of the group's demonstrated ability to establish just institutions.³⁷ This approach, however, cannot provide a conclusive justification of the group's territorial jurisdiction against the same title of the state from which it has separated. The former may in fact display both the ability to establish just institutions and some form of attachment to the contested territory.

If the state from which the group has seceded also upholds just institutions, it still holds territorial jurisdiction there. Moreover, it is likely that the non-seceding individuals belonging to the original state – actively engaging with the contested territory – may still display a significant attachment to the territory contested, and thus they may contend that they have a right to exert territorial jurisdiction there. The non-seceding community likely relies on that territory to exercise its right to self-determination, and its members also likely rely on that territory for the pursuit of their life plans. If this were the case, attachment would not constitute a determining element in favor of the seceding community's interests in the contested territory.

Consider again the case of Veneto. Italy upholds just institutions and relies on the exploitation of natural gas found outside the coast of Veneto. The whole Italian community has exercised its self-determination by actively participating in the international natural gas extraction sector. Moreover, the members of the other Italian regions have built industries and businesses – also within the contested territory – in support of the natural gas exploitation activity in Veneto, thus relying on resources found there for their individual life plans. In addition to the natural

³⁵ Stilz, *Occupancy Rights*, 332.

³⁶ Nine, *Global Justice and Territory*, 153.

³⁷ Stilz, *Occupancy Rights*, 326; Nine, *Global Justice and Territory*, 45.

resources, Veneto is the location of important historical sites and hosts Venezia, which is considered by Italians one of its trademarks and a significant touristic attraction.

Veneto's ability to uphold just institutions is matched by the same ability of the government of the Italian Republic. Moreover, Italians display some attachment to the Venetian territory as well, challenging Venetians' claim against Italians using their territory without permission. Even if one were to argue that Veneto displayed the deepest form of attachment to the territory it occupies, this would merely establish that the Venetians have a claim that their resource rights within the territory of Veneto are respected. However, such an argument would not affect the grounds of the Venetians' right to territorial jurisdiction there, which depends only on their ability to establish just institutions.

A pre-institutional account of territorial jurisdiction is needed to establish the group's claim against the existing state using its territory without the group's permission, and the group's immunity against the state's territorial jurisdiction. Direct theories provide such an account by grounding the group's territorial jurisdiction on its attachment to a particular territory. In this way they are able to settle unequivocally that the group's jurisdiction regarding the territory it occupies overcomes the existing state's freedom to use it. Once this priority is settled, a direct theory needs only to stipulate the constraints on the group's right to secede.

3 Direct Theories

In this chapter, I concentrate in particular on Simmons' direct theory because with it LBC shares the idea that an agent acquires territorial jurisdiction on the basis of individuals' right to self-government. Even if Simmons' account is individualist and LBC is collectivist, the similarity between the two arguments grants a closer look at the individualistic Lockean theory. Before I do that, however, I wish to address some limitations that the collectivist and statist direct theories have in tackling the issue of secession.

The utilitarian statist direct theory rejects unilateral secession if the group wishes to secede from a state that effectively performs its functions of upholding order and achieves the aggregate happiness of its subjects. In Chapter 4, section 2.1, I discuss the limitations of this account. In particular with regards to secession, the utilitarian theory is not able to address the particularity requirement, leaving unanswered the issue of why the existing state has a right to control the particular territory under its jurisdiction, and why it is able to establish robust rights there at the expenses of subgroups with aspirations of independence. Moreover, the theory is afflicted by the charges of ethnocentrism, allowing only one type of political organization to assert territorial jurisdiction regarding territory and resources, regardless of the many complex ways in which territory may be important for the achievement of individuals' happiness.

Collectivist theories are more successful in addressing the issue of ethnocentrism, with the exception of liberal nationalism. Liberal nationalism, in fact, relies on an unconvincing description of the group as a homogeneous national community, which seldom reflects the nature of existing political groups. As a result, the focus on national communities limits the application of the theory only to some groups excluding others that may present the same attachment to the particular territory at issue. The liberal nationalist account of territorial rights thus suffers from what Simmons calls the problem of 'trapped minorities:' those who are not included in the majority national group are ultimately left with no jurisdictional powers on the territory with which they also have established a meaningful relation. This gives some groups an unjustified advantage over others.³⁸

On the other hand, the self-determination theory and the plenitude theory provide a version of the collectivist direct theory that is able to address both the *in rem* problem and the particularity requirement, and do not suffer from the charges of ethnocentrism. According to both accounts, groups acquire territorial jurisdiction on the territory that they occupy on the basis of their right to self-determination. Kolers in particular suggests that groups that share a social ontology regarding land and a

³⁸ A. J. Simmons, "Territorial Rights: Justificatory Strategies," in *Oxford Studies in Political Philosophy*, eds. D. Sobel, P. Vallentyne, S. Wall (Oxford: Oxford University Press, 2015), 155; Nine, *Resource Rights*, 243.

pattern of land use are worthy of territorial rights. The openness of the theory towards different ways to understand and value territory makes it particularly sensitive to the issue of ethnocentrism, and one would expect that Kolers would support the view that communities that can hold territorial rights have a right to secede even from just states.

On the contrary, Kolers argues that unilateral separation from an existing state may be permissible only if the seceding group does not pursue illiberal and unjust values. For example, he argues that the separation of the northern Italian regions is impermissible given the nationalist rhetoric and their wish to escape their obligations towards fellow Italians.³⁹ However, if the problem of unilateral secession is the possibility of escaping one's obligations, then one may argue that the northern Italian regions may permissibly secede if and only if they continue to maintain their special obligations towards Italians. The contrast between the expected acceptance of a right to secede from the plenitude theory and the rejection of secessions from just states from Kolers, I believe, rests on the problem discussed in Chapter 4, section 3.2, regarding the identification of the holder of territorial jurisdiction. What matters for Kolers is not that the existing state is just, but that the communities that wish to separate do not belong to the same system of plenitude, and thus that they do not share the same social ontology and the same land use patterns. In this way Kolers wishes to avoid cases of secession between communities that are significantly similar and whose members share strong reciprocal obligations.

However, social ontology and land use patterns may at times conflict, and in those cases Kolers does not indicate which factor should take priority in determining the right holder. In the case of the northern regions of Italy, the use patterns are consistent with those of the rest of Italy, making the group entangled with the system of norms that the Italian Republic upholds, and thus also corroborating the existence of a relationship of mutual support between the two groups. Considering the land use patterns, then, the northern Italian regions and Italy do not sufficiently differ and they constitute a unitary system of plenitude. On this ground, the Italian Republic could demand that its territorial jurisdiction is not endangered. On the other hand,

³⁹ Kolers, *Land, Conflict, and Justice*, 179.

the social ontology of, for example, the members of Trentino Alto Adige is significantly different from the social ontology upheld by the Italian Republic, including their language and the allegiance to the Germanic culture that was in the recent past consistently frustrated by attempts of Italianization of the area.

The self-determination theory proposes a less restrictive account of secession, as expected given its commitment to respect communities' right to self-determination and their specific territorial demands. However, the determination of the extent of a community's territorial rights is left to the community's own understanding of what it means for it to be self-determined. Moore offers no limiting principle to the demands of the community with exception of the respect of others' rights to subsistence.⁴⁰ In the case of secession, Moore argues that the past relation between the seceding group and the existing state grants some duties of reciprocity in favor of the remaining members of the existing state.⁴¹ However, these duties of reciprocity are due only if the groups that are now separated were in a mutually beneficial relation with each other. It is not necessary that the relationship was equally beneficial, but it is important that because of their past relationship, "the participants are better off than they would have been had there been no interaction at all."⁴²

It may be very difficult to assess whether Trentino Alto Adige benefitted at all from its forced integration to the Italian Republic and the Italianization process that it underwent through the 20th Century. Moore could argue that the relation between Italy and Trentino was at some point beneficial, but it is not easy to determine whether the benefit from the most recent interactions makes up for the losses that historically Trentino had suffered. Would Trentino have been better off if it had no interaction at all with Italy? It is certainly challenging to evaluate whether the most recent beneficial relations between the parties compensate Trentino for the cultural oppression and the imposition of Italian as the official language, and the opportunity cost of not having been part of Austria or Switzerland. Moreover, even if it were determined that Trentino would have been better off without any interaction with Italy, it still seems that its secession would demand some duties towards Italy on the

⁴⁰ Moore, *Political Theory*, 174, 182.

⁴¹ Ibid., 129.

⁴² Ibid., 130.

basis of the fact that Trentino is currently one of the richest regions in Italy, and that Italians rely on its prosperity for their current life plans and self-determination. It seems that the relevant issue with regards to secession of richer communities is not what kind of relation the parties had in the past, but to what extent they rely on each other today.

The idea of reciprocity proposed by Moore also permits that groups seceding from unjust states may leave the oppressive institutions without maintaining any bonds with them. For the self-determination theory, then, South Sudan seceding from Sudan would have no duty of reciprocity towards the Sudanese people, given that the history of violence and oppression clearly indicates that South Sudan would have been better off without any interaction with Sudan. Upon secession, the new South Sudanese government has only duties of global justice to ensure that Sudanese have enough for their subsistence.⁴³ However, the people of Sudan rely significantly for their life plans on the oil found within South Sudan, and given that Sudan is an unjust and oppressive government, it would be unfair to trickle down the responsibility of the atrocities committed towards South Sudanese to all the members of the Sudanese community. Granted that those who have committed atrocities must be punished for their crimes, it is unclear why the whole population would have to suffer for the crimes of those responsible. Focusing on institutional reciprocity may be acceptable if the institutions of the parties do in fact represent their people, but in the case of unjust states this is not true. Some duties of reciprocity at least towards the existing state's members may have to be respected, in order to ensure that the members of the existing state do not suffer a sudden worsening of their wellbeing, regardless of whether interactions between the parties were positive in balance.

In the remaining part of this section I examine in detail the individualist direct theory proposed by A. John Simmons. The individualist Lockean theory shares with LBC the idea that territorial rights are grounded on the principle of individual self-government. As I explain in Chapters 5 and 6, the principle of self-government highlights the role of communities in the determination and pursuit of individuals' life plans, and defines territory as one fundamental feature of individuals' chance to

⁴³ Ibid., 133.

be project pursuers. The individualistic direct theory is not susceptible to the *in rem* problem. For Simmons, individuals acquire natural property rights and jurisdictional powers in the land that they occupy on the basis of the labor mixing principle. Given their title, they can authorize political institutions to exert territorial jurisdiction only within the land that they own and by consenting to their authority. No other group of people can authorize political institutions on their land, nor can they exert territorial jurisdiction if they do not hold property rights there. A group, for Simmons, can always secede as long as its members have a fundamental jurisdictional title to that particular land, and properly authorize the group's institutions. I argue, however, that Simmons' theory has one problematic implication: the theory relies on a system of private property rights on land the protection of which undermines the values that underpin it.

To mix one's labor with a territory is to invest the land with a specific and strategic role in pursuing one's directive ends.⁴⁴ Directive ends represent an individual's central goals and contribute to defining the individual's identity.⁴⁵ Having a genuine opportunity to form and pursue directive ends is what Simmons identifies as the exercise of individuals' self-government. The fundamental interest in self-government differs from collective self-determination, which identifies a collective right to pursue a common goal.

In Simmons' theory, individuals can acquire property in virtue of the fact that they hold a fundamental interest in their self-government. Self-government, Simmons argues, requires full control over some objects: in particular, to perform our natural duties (e.g. perform one's parental duties), to pursue non-obligatory ends (e.g. the liberty to believe and practice a religion), and to make special obligations (e.g. the power to enter a contract), individuals need full control over their bodies, over the necessary tools to perform required actions, and over the objects that they need to exchange with others.⁴⁶ Because they are equal moral agents, individuals have an

⁴⁴ Matthew H. Kramer, *John Locke and the Origins of Private Property* (Cambridge: Cambridge University Press, 1997), 145; Simmons, *The Lockean Theory of Rights*, 273.

⁴⁵ Lomasky, *Persons, Rights, and the Moral Community*, 57. I believe this to be the best interpretation of the plans and projects of individuals embodied in their acquisition of property. No plan justifies the acquisition of external objects but only those that are significant to the identity of a person. Stilz develops a very similar concept and calls it 'located life-plans' (Stilz, *Occupancy Rights*, 336).

⁴⁶ Simmons, *The Lockean Theory of Rights*, 85.

equal entitlement to acquire what they need to be self-governing. For this reason, the acquisition of one should not radically limit others' freedom to do the same.⁴⁷ With this proviso, the theory establishes property rights in land that are justifiable to all.⁴⁸ As long as the appropriation of one does not limit the opportunity of others to appropriate enough and as good for their own self-government, the entitlement created by appropriation is valid against all.

By exercising their self-government through the acquisition of property, individuals also acquire territorial jurisdiction over their land and the power to transfer jurisdictional authority to political institutions. The state's territorial jurisdiction over publicly owned land can be then justified with regard to the function that public spaces have in allowing shared activities of its members, such as recreation and gathering.⁴⁹ In this model, individuals can always withdraw jurisdictional powers from the political institutions and secede, making possible individual secession. Thus a group has a legitimate right to secede every time its members desire to do so, and regardless of the merits of the resulting institutions, provided that its members' desire to secede is expressed by valid consent and that they have property rights on the territory they wish to control.⁵⁰

The members of the seceding group, in Simmons' view, can assert full property rights on the territory at the center of their directive ends. The seceding group has, thus, a claim that others, including the non-seceding members, not use its territory. The group's title is valid as long as the non-seceding community's members have the opportunity to acquire enough and as good to be self-governing, regardless of the implications that secession may have for the survival and proper functioning of their institutions.

If that were correct, others' opportunity to protect their right to self-government may be unnecessarily curtailed. Simmons' theory, in fact, sets no requirements for the group to continue cooperation with the state from which it has seceded concerning land and resources that are also strategically important (although perhaps not

⁴⁷ Ibid., 86.

⁴⁸ Simmons, *On the Territorial Rights of States*, 226.

⁴⁹ Ibid., 314

⁵⁰ Ibid., 315; Steiner, *Territorial Justice*, 28-38.

essential) to the realization of the directive ends of the state's subjects.⁵¹ Take for example the case of the partition of the Indus basin following the separation of India and Pakistan. The Indus basin provides water for Pakistan and a large area in North West India. Before the separation of the two countries, the basin was developed as a cohesive system of canals. The source of the rivers of the Indus basin is located in India. Following the partition of India, Pakistan could have lost its most important source of water, given that the water system was suddenly under the control of its rival.

Following Simmons' approach, upon separation from Pakistan, Indians would have had full property rights in the sources of the Indus and the irrigation system. Consequently, Pakistanis would have had to endure the loss of an important source of water and independently develop a new irrigation network. Moreover, even if India was found to be under a duty to compensate Pakistan for the colossal drain on its economic resources and the long wait for a new irrigation system, India would have been the legitimate owner of all the six tributaries to the Indus, effectively maintaining a significant advantage over its rival in the event of a military conflict.

However, if as Simmons argues, the interest in self-government grounds rights, individuals should enjoy only those entitlements that are necessary for the protection of this fundamental interest. Self-government does indeed require a moral space "within which what one has is marked off as immune from predation."⁵² This space, however, need not be equated with full control over some particular objects.⁵³ Self-government justifies, at best, the emergence of some of the incidents of ownership.⁵⁴

So for example, one needs to enjoy non-interference when one needs to bring one's children to school, without having to enjoy full ownership of the road. Nor does one need to own a stage to perform a public speech. For individuals to enjoy freedom of speech it is sufficient that the likelihood of their freedom to speak at certain times in

⁵¹ For Simmons the seceding party may have a duty to compensate the original state for "any improvements previously made to the portion [of land] seized" (A.J. Simmons, "Historical Rights and Fair Shares," *Law and Philosophy* 14, no. 2 (1995) 169).

⁵² Lomasky, *Persons, Rights, and the Moral Community*, 120.

⁵³ Waldron, *The Right to Private Property*, 169, 190

⁵⁴ I endorse Honoré's account of ownership as a bundle of normative incidents – see Honoré, *Ownership*.

public is sufficiently high.⁵⁵ Finally, in exercising the right to make agreements, one needs the ability to control something that others can rely on to make agreements, such as something to sell, or use to produce goods, or some type of income to serve as payment. However, these are only incidents of full ownership rights, which need not appear all at once to allow individuals to make contracts.

Since individual self-government does not necessarily ground full property rights, the members of the seceding group do not necessarily have full property titles in their land. Accordingly, the seceding group and the members of the non-seceding community may have some competing legitimate interests in the same territory. It seems in fact that sharing the control and management of the Indus water network with Pakistan would not have constituted a significant obstacle to the right of self-government of the members of the Indian community.

The inflexibility of a pre-institutional system of property rights in land is also apparent when one considers another problematic implication of Simmons' theory, that of individual secession. Proponents of individualist Lockean theories of territorial rights accept that individuals are allowed to secede separately from others in virtue of their property rights on land. To mitigate this troubling implication they suggest that it would be inconvenient for individuals to exercise their right to individual secession, and that for this reason this would never be a significant problem.⁵⁶ Although this may be true, individuals continue to hold exclusive territorial jurisdiction within their legitimately-owned land that allows them to secede with it, regardless of fact that losing control of the seceding individual's land could compromise the correct functioning of the parent state's institutions.⁵⁷ This contributes to show that direct theory advocates have not successfully provided a set of appropriate constraints on the right to secede.

⁵⁵ Matthew Kramer, *The Quality of Freedom* (Oxford: Oxford University Press, 2003), 175.

⁵⁶ Hillel Steiner, "May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction: A Response to Nine," *Political Studies* 56, no. 4 (2008): 949–956; Kukathas, *The Liberal Archipelago*, 139–140.

⁵⁷ Tesón is an exception among the defenders of the individualistic Lockean theory in suggesting that individuals do not have a right to separately secede (Tesón, *The Mystery of Territory*, 46). However, rejecting individuals' right to secede separately means to reject that individuals acquire powers of meta-jurisdictional authority when they acquire property in the state of nature. This goes against the individual foundation of the Lockean theory. See my discussion in Chapter 4, section 4.1.

Consider, for example, the case of the separation between Wallonia and Flanders. For the individualist Lockean theory, either one group may unilaterally secede, and the individuals owning property in Brussels may move that property and its resources under the new established institutions. However, this would constitute a considerable loss for the other group, given that both Wallonia and Flanders rely on Brussels for most their economic activity. In this case, even if both groups have a right to unilaterally secede, secession would endanger irreparably the existing political institutions on which individuals rely for their life plans, thus threatening their self-government.

Finally, ownership on a piece of land is neither necessary nor sufficient to bestow upon the titleholder the right to secede. Consider, the case of Scotland seceding from the UK. Not all Scottish residents own a piece of land there. However, it would be odd to suggest that only landowners were entitled to choose whether Scotland should secede. Persons' power to choose the political arrangements to which they are subject constitutes a significant protection of their interest in self-government, whether or not they also enjoy ownership in the land that they occupy. Moreover, it would be equally odd to suggest that those who own land in Scotland can participate in the referendum on Scottish secession, regardless of whether their political participation is at the center of their directive ends. Individuals, thus, do not need to be landowners to also have the right to secede, nor can anyone who holds property in land for that only reason participate in deciding the political institutions to which their property is subject.

4 Legitimacy-Based Conventionalism

Direct theories successfully explain how individuals can establish pre-institutional rights on a particular territory that are valid against all. For these theories groups can secede unilaterally when them or their members have rights to the land that they occupy. Direct theories have an easy time showing why a group can establish its institutions in the territory its members occupy, and why it has a claim that the state from which it has seceded does not use its territory or an immunity against the state's

territorial jurisdiction there. To avoid supporting implausible secessions, however, a direct theory needs to provide an account of the constraints to a right to secede.

I have argued that Simmons' proposal offers a promising theoretical framework, grounding territorial rights in individuals' fundamental interest in self-government. However, it does not account for different degrees of interest that the parties may have in a contested territory, and it grounds territorial jurisdiction on an inflexible system of individual property rights in land that does not always succeed in protecting individuals' interest in self-government. In this section, I argue that the interest in self-government can support a different type of territorial rights – rights that are better suited to handling the disputes that arise during secession.

My proposal rests on the conventionalist theory of territorial rights constrained by a legitimacy threshold developed in Chapters 5 and 6. According to conventionalist theories, entitlements emerge on the basis of the implicit or explicit recognition of the regularity in the behavior of members of a population that are faced with recurrent situations. Individuals comply with regular schemes of behavior in virtue of the fact that such regularity settles a system of stable expectation. This allows them to make long-term plans on the basis of expected behavior from their fellow members of society.⁵⁸ So for example, a community will settle for a system of entitlements that protects current possessions because the existing distribution of holdings is the most accessible solution to a problem of cooperation.⁵⁹ Conventions ensure that the entitlements established by the relevant community are recognized among its members, and that those subject to them have acknowledged the duties imposed by such entitlements.⁶⁰

The conventionalist account offers a convincing story about the emergence of normative relations that give rise to an effective social order. The order that emerges from the interaction of the members of a society is also one where the nature and aim of social cooperation is developed, giving concrete form to the political beliefs shared by the members of the community. Such a system of social norms is the first

⁵⁸ Gauthier, *David Hume*, 17.

⁵⁹ Hume, *Treatise*, 501-513; Bicchieri, *The Grammar of Society*, 4.

⁶⁰ Friedrich A. Hayek, *The Constitution of Liberty* (London: Routledge, [1960] 2006), 56-57; Gaus, *The Order of Public Reason*, 164, 169.

expression of individuals' exercise of self-government and offers the basis for peaceful social relations. Individuals' fundamental interest in developing and pursuing directive ends within a settled normative framework and the value of peaceful social relations warrant the protection of freedoms and powers regarding territory defined by social norms.

A purely conventionalist system of rights is however not necessarily just.⁶¹ The cost of a fully conventionalist account is the complete reliance on relations of domination between appropriators. This, realistically, translates into the success of the strongest.⁶² The proposed account, however, differs from purely conventionalist theories, as it demands that a system of conventional entitlements sufficiently protects all individuals' interests in being able to form and pursue directive ends for it to establish a community's exclusive titles to territory.

For LBC, conventions establish entitlements on territory that are protected by claims and immunities, so long as those within the system of conventional entitlements have a genuine opportunity to develop and pursue directive ends. In the previous chapter, I suggested that conventions fulfill this role if they facilitate cooperation among individuals towards the protection of every member's basic interests. This requires that the norms that the group upholds show concern for weaker members of society. In a system of legitimate entitlements the benefits of cooperation should be used to provide relief against extreme poverty and poor health for the community's members, ensuring that all members enjoy a sufficient level of wellbeing. Such a level may change depending on the average level of wellbeing enjoyed by the whole community and on the resources available to it. The system of social norms must tolerate individuals' dissent and their desire to exit the association when they see fit. Finally, individuals should also be able to enjoy basic economic rights that will ensure their relative independence from each other.

⁶¹ There are no examples of purely conventionalist theories of territorial rights. But one example of pure conventionalism can be found in Kukathas (Kukathas, *The Liberal Archipelago*, 172, 210). My proposal comes close to Stilz's hybrid account (Stilz, *Occupancy Rights*, 333). In her formulation, the hybrid theory gives rise only to a freedom to occupy a territory and a claim that others do not displace the right holder, but not also to territorial jurisdiction, making the account an indirect one even in its hybrid form (Ibid., 329). In my proposal, instead, attachment also establishes territorial jurisdiction.

⁶² Jeremy Waldron, "The Advantages and Difficulties of the Humean Theory of Property," *Social Philosophy and Policy* 11, no. 2 (1979): 123.

LBC accepts that some individual property rights may be established prior to the establishment of social norms. Individuals may acquire property rights prior to the establishment of social norms, together with the jurisdictional and meta-jurisdictional powers to participate in determining the social norms applicable to the territory that they occupy. However, differently from Simmons, individuals need not acquire ownership in particular pieces of land to also be able to participate in the determination of social norms. As long as they occupy that territory, and as long as their presence there is central to the determination and pursuit of their directive ends, they hold jurisdictional powers on that territory together with their fellow members of society. Territorial rights are most importantly associated with the preservation of a stable and collective system of expectations on the basis of which individuals can develop and pursue their directive ends. But because of their collective nature, they should not be readily equated to individuals' property rights, which instead are associated with a fair distribution of resources among the members of a community.

The legitimacy threshold establishes minimal requirements that conventions protect all members' interests in developing and pursuing their directive ends. For this account, thus, communities are able to unilaterally establish jurisdictional and ownership rights on territory without the reliance on political institutions. For example, consider the case of Kurdistan. Within the borders of this geo-cultural region, a largely homogeneous community regulates its social practices with some independence from Turkey, Syria, Iran, and Iraq – the existing governments that enjoy internationally recognized sovereignty over Kurdistan. Kurdish people, different from their neighbors, for the most part uphold the separation between religion and state and have incorporated some western practices in their life. Women and men share family roles, women can study and work, and Kurds often uphold practices that are forbidden for example in Iraq among the Sunni, like that of decorating their body with permanent tattoos.

After the 2003 war in Iraq, most of the areas in Kurdistan that were once under the control of Iraq have also developed independent systems of organization that led the region to a peaceful recovery and to programs of education, urban planning, and

infrastructure.⁶³ The social cooperation that emerged after the war displayed some concern for the weaker parts of society by providing help and assistance to those deprived of jobs, and opportunities for education.⁶⁴ Such arrangements offer an example of how a community can successfully develop legitimate norms that entitle its members to some robust territorial rights in the areas that they have occupied, allowing them to secede and to establish new political institutions. The case of Kurdistan also shows that these communities may acquire territorial jurisdiction and resource rights regardless of the poverty that vexes them and the threats of political instability and war from neighboring countries.

However, their rights against others using their territory is justified only to the extent that such rights are needed to establish and sustain legitimate conventions. If the community upholds social norms that are not legitimate, it holds only freedoms and powers to use and manage the territory, but not also a claim that others do not control and use the territory without its permission or an immunity against others' competing powers. Rights regarding a particular territory, then, are valid against all if they are determined by conventions that meet the threshold of legitimacy. Additionally, they are exclusive only to the extent that their exclusiveness is needed for the protection of the interest in self-government of the group's members. This means that a community has a claim against others using its territory only to the extent that others' freedom to use their territory is a threat to the preservation of the conventions' minimal standards of legitimacy.

Imagine Turkey decides to cooperate with the Kurdish regional government to control the borders with Syria in the attempt to pacify the area to protect Turkish citizens residing in the neighboring territories. Imagine that Turkey accords refugees from Syria rights to settle in the area of Kurdistan within Turkish borders in an attempt to weakening the Islamic state by supporting its opponents. Imagine also that Turkey's involvement in the area has the opposite effect of empowering the Islamic State, which is able to smuggle Islamic State sympathizers in Kurdistan and weaken the Kurdish resistance. In this case, Turkey's exercise of territorial

⁶³ "The Kurdistan Region," Kurdistan Regional Government, <http://cabinet.gov.krd/a/d.aspx?s=03010300&l=12&a=23911&r=140&s=010000>

⁶⁴ Henri J. Barkey and Ellen Laipson, "Iraqi Kurds And Iraq's Future," *Middle East Policy* Xii, no. 4 (Winter 2005).

jurisdiction within the Kurdish territory has the effect of heavily disrupting the existing system of social relations in Kurdistan, as well as working against the local system of resistance against neighboring threats of war and invasion. This has the effect of reducing Kurdistan's chances of sustaining a legitimate system of social norms. In this example, the Kurdish government that upholds legitimate social norms has a claim that Turkey does not exert territorial jurisdiction within the territory of Kurdistan and does not take control of its borders.

However, others' interference with the community's territorial rights may not be so disruptive. If such interference is not a threat to the legitimacy of the community's conventions, the community has no claim against outsiders using its territory, or immunity against others exerting territorial jurisdiction there. For example, if Turkey's control of the border between Kurdistan and Syria does not provoke disruptive consequences, Turkey is free to conduct its activities to achieve the pacification of the area and to contribute to resolving the refugee crisis. If that is the case, the weight of Turkish people's right to use and control the Kurdish territory will correspond to the importance of their interest in that particular territory.

Such competing interests are the ground of competing powers liberties to control and use the contested territory. This can lead to one or more groups having a freedom to use and benefit from the same territory, as well as possible competing powers to modify and dispose of its resources.⁶⁵ Conflicts that may arise from such situations will have to be addressed with an adequate system of adjudication and coordination.

In the case of secession, the interest of the previous members of society is of particular importance in the determination of the groups' territorial rights. In fact, it is more than likely that the members of the previous society had significantly relied on the enjoyment of the (now) contested territory for the development and pursuit of their directive ends. Given the reliance on that particular territory, it is also likely

⁶⁵ For someone to have a liberty that is not protected by a claim against interference means that other agents have no rights with regards to the object to which his liberty applies. Another agent may have a liberty as well, just like in the case of secession, and either agent may not appeal to any public system of coercion to ensure that others do not interfere. Both are, however, permitted to 'have recourse to their own devices' within the some limitations (Matthew H. Kramer, Nigel E. Simmonds, Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998), 10).

that the members of the previous community may effectively protect their interest in self-government only with the control and use of the territory now contested. In this case, the parties must acknowledge the presence of conflicting and legitimate interests in the same territory.⁶⁶ I suggest that the reconciliation of competing legitimate liberties on the same geographical area demands that the parties acknowledge a duty to compromise to achieve a mutually satisfactory balance regarding the protection of their interests.

The duty to compromise is grounded on the parties' equal moral standing in so far as they uphold legitimate conventions. The parties ought to ensure that stability of expectations and peace are restored, and that the arrangements regarding territorial rights arising from secession respect the interest in self-government of both groups' members.⁶⁷ Given that their interests are incompatible but also equally legitimate, the parties must reach a mutually satisfactory agreement with regards to their rights to the contested territory, though retaining the unilateral right to establish their preferred political institutions.

5 Compromise and Secession

Conventions establish the right of the seceding group to acquire territorial jurisdiction regarding the territory it occupies in virtue of the protection of its members' interest in self-government. The group's right to secede, thus, is grounded on its members' right to pursue their life plans by participating in the determination of their preferred social norms. However, the group can acquire a claim against others using and controlling its territory and an immunity against the existing state's powers over the same territory only to the extent that the social norms that it upholds are legitimate. In particular, the seceding group can demand that the members of the state from which it has separated do not use and control its territory

⁶⁶ Kukathas stresses the importance of addressing the existence of a plurality of interests that may ground well-founded competing claims. This paper accepts his proposal and endorses the idea that competing and overlapping jurisdictions are a possible and desirable occurrence (Kukathas, *The Liberal Archipelago*, 86, 75).

⁶⁷ If the freedoms and powers are not incompatible and do not endanger individuals' fundamental interest in forming and pursuing their directive ends, the duty to compromise simply does not arise.

only to the extent that this is necessary for the protection of the legitimacy of its conventions. This limitation ensures that secession does not necessarily entail a radical worsening of the wellbeing of the non-seceding community by completely excluding its members from the enjoyment of the contested territory.

If the parties' shared enjoyment of the contested territory does not endanger the legitimacy of either group's conventions, they can only assert a freedom to use it, and overlapping jurisdictional powers over it. This amounts to a liberty that is not protected by a claim that others do not use the contested territory and a power that is not protected by an immunity against competing and overlapping powers on the same territory. Because of their past relations, it is likely that the two parties have freedoms and powers that conflict, given that they have been using and controlling the same territory until secession. In a situation of conflicting titles that are, presumably, similarly important, the parties owe each other a duty to compromise to determine arrangements that ought to achieve a balancing of interests.

So for example in the case of Veneto that wishes to secede from the Italian Republic, Veneto has a right to secede unilaterally on the basis of its social norms that support a system of beneficial social cooperation. In so far as the Venetian system of social norms is able to maintain a sufficient standard of legitimacy, Veneto can take exclusive control of its territory, establishing there political institutions that, for example, allow it to tax property and make decisions regarding solutions to the issue of the sinking city of Venice. However, because its natural resources and the city of Venice are included in the Italian social norms, and because Italy has relied on these for its prosperity, Veneto may not unilaterally sever ties with Italy regarding such important territorial holdings. Given that Italy has some territorial rights on Veneto's land and resources, the two parties will have to achieve a mutually beneficial agreement and probably continue cooperating.

The system of conventions also allows us to identify the relevant territory that the seceding group can assert as its own, that is the territory on which the system of conventions impinges. This account does not lead to the problematic implication of individual secession. Social norms may determine individual private property rights on land, given that individuals within a group may develop a system of allocation that relies on the private allotment of land. However, such entitlements are exclusive only

because they are embedded in recognized normative practices, which rely on a wide network of legitimate normative relations that protect all individuals' interest in forming and pursuing directive ends. A separate individual may not isolate from such a system of legitimate expectations, taking territory with him, without also losing the moral grounds for his exclusive right to property in that particular land.

Moreover, regardless of whether they have ownership rights on the land that they occupy, individuals retain jurisdictional powers to establish and participate in the determination of social norms. Thus, a group of individuals may secede even if others have property rights within the territory that the seceding group occupies. So far as Scotland upholds legitimate social norms, its residents may hold exclusive territorial rights even if they reside on land owned by English citizens residing in London. In this example, the English landowners would retain property rights on their land in Scotland but would have to accept that upon secession the Scottish government will have jurisdictional powers regarding, for example, the taxation of their property.

Secession is chiefly an institutional change and it is not sufficient to indicate the grounds of a right to secede. A theory of secession should also indicate the relation between the right to secede that a people has, the institutions that this population entrusts with exerting territorial jurisdiction on its territory, and the interconnection of these institutions with the wider system of international relations. The proposed theory shares with Simmons' the idea that political institutions can exert territorial jurisdiction if their subjects consent to their authority. Consent has to be suitably expressed or implicated by some of the consenters' actions.⁶⁸ Individuals ought to be able to express their consent to political institutions to legitimately exert jurisdictional authority. For consent to be a legitimate source of political authority, individuals ought to be able to give their consent intentionally and voluntarily.⁶⁹ For this to happen, at least three conditions must be met: (1) people must be able to know in general terms the situation and the consequences of their consent to the new institutions; (2) the expression of dissent must not be too costly; and (3) the

⁶⁸ A.J. Simmons, "Tacit Consent and Political Obligation," *Philosophy and Public Affairs* 5, no. 3 (1976): 276.

⁶⁹ Simmons, *The Lockean Theory of Rights*, 177.

consenting individual must be to a certain degree independent from the political institutions, to the extent that she can form her ideas independently from manipulation from the political institutions.⁷⁰

It is not necessary that consent is given unanimously to the new institutions. The appropriate number of members whose consent is required to establish new political institutions will likely be determined by the type of political participation that the two communities see fit in the determination of major institutional changes. However, given that such a political decision has widespread implications on the lives of most members of society, it is likely that the widest participation possible would be the most appropriate. Because unanimity is not required to support political institutions, some individuals might be part of the seceding community even if they do not participate actively in the political act of secession. It is likely that talks of secession might inspire discontent with existing institutions, but that these might not translate into an explicit consent for the new institutions. Moreover, it is likely that large parts of the population, dispersed away from the political centers, might not be interested in participating or supporting the secession. Some people might, then, end up being subsumed within a new political authority by the decisions of a particularly active majority. According to this view, groups of people uninterested in political participation continue to have some political obligations. They owe political obligations to the state that, by territorial extension, has acquired and imposed control of the land that they occupy on the basis of the fact that it represents the existing system of social norms upheld there.

In particular, people who have acquiesced to the secession and who have not expressed their discontent with the seceding group's activity are assumed to have tacitly consented to the new institutions. This is true, however, only if some conditions apply. Silence of a person constitutes tacit consent only when five conditions apply: (1) it must be clear that the situation requires consent and the individual must be aware of what is happening; (2) people must be given a reasonable period of time when they can object or express their dissent, and this period must be known to the person; (3) it must be clear that the time in (2) is coming to an end; (4)

⁷⁰ Wenar, *Property Rights and the Resource Curse*, 21; Simmons, *Tacit Consent and Political Obligation*, 25.

the means to express dissent must be accessible to all; and (5) the consequence of dissent ought not be extremely detrimental.⁷¹ A state that can legitimately and, to a significant extent, exclusively exert authority upon its subjects can only be one that allows its subjects to form their ideas about the state's activities with sufficient independence. This effectively requires minimal civil liberties and political rights. So, for example, citizens must be able to access information about the state's activities and be able to participate in these activities (and dissent) without risk of suffering great costs in their life and wellbeing.⁷² These requirements constitute the ground of territorial jurisdiction of the newly established political institutions and the basis for the international recognition of the newly established institutions.

It is important at this point to remind the reader that the requirements for the legitimate exercise of territorial jurisdiction and resource rights are less demanding than the requirements that must be fulfilled by a community for it to be considered fully sovereign. As I mentioned at the beginning of the chapter, sovereignty is a complex array of entitlements the appropriateness of which must be assessed independently. Here I have offered only the set of requirements that ensure that the exercise of jurisdiction on a territory and its resources is legitimate, but the fulfillment of these requirements may not tell us also whether the exercise of more extensive political authority is also legitimate.

I have suggested that, if the conventions are legitimate, a group has a claim that the state from which it has seceded not use its territory and an immunity against its territorial jurisdiction only to the extent that such claims and immunities are necessary for its members to have a genuine opportunity to form and pursue directive ends. If exclusion is unjustified, the seceding group acquires only freedoms to use and manage the territory it occupies and unprotected powers to control it. The group's liberty-right to exclude others from its territory may be challenged, then, on the basis of the protection of the legitimate interests of the members of the non-seceding community that are important but not essential to their own self-government.

⁷¹ Ibid., 276.

⁷² Wenar, *Property Rights and the Resource Curse*, 21.

A duty to compromise requires that both parties recognize their mutual legitimate interest in the contested territory, and that they find agreement regarding the division of territorial holdings. This requires that the parties enter in what may result in a long process of communication and conciliation on the basis of mutual respect.⁷³ The goal of such a process must be that of advancing the parties' interests equally.⁷⁴ As I discuss in Chapter 6, the duty to compromise is a duty of global justice, but it is likely to be more demanding for seceding parties given the permanence of relevant and conflicting interests in the once-shared territory.

The duty to compromise may lead the parties to set up systems of adjudication and cooperation for mutual benefit. In the example proposed earlier, a commitment to balancing interests would imply that India and Pakistan negotiate the fate of the irrigation system of the Indus basin. The negotiation should take into consideration the cost of the development of a new water system, and the political risk of allowing one party of a conflict to keep full control of an important resource. The compromise may result in something like the Indus Water Treaty, the result of a long process of peaceful negotiations supervised by a third party arbitrator (in this case the World Bank).

The treaty considered the water source to be of interest to both parties equally and allocated to the two countries' control over three tributaries of the Indus each. These rivers are located on Indian soil; nevertheless, the compromise was brought about with the premise that the rivers were not owned by India, but were instead objects of shared ownership, given their importance for Pakistan. Moreover, the treaty established a permanent commission to tackle the process of cooperation that the two countries on the verge of war had to undergo. Since the treaty, the two countries engaged in two wars, neither of which had to do with the issue of water.

When the costs that the existing state may incur are exceptionally high, the members of the seceding group may also have to moderate their aspirations for independence by giving up some of their demands. After all, the non-seceding individuals have a

⁷³ For a proposal for what constitutes a 'good compromise' see Philippe Van Parijs, "What Makes a Good Compromise," *Government and Opposition* 47, no. 3 (2012): 479.

⁷⁴ Cara Nine, "Compromise, Democracy and Territory," *Irish Journal of Sociology* 20, no. 2, 91-110, (2012): 101, 105.

fundamental interest in self-government that is equal to that of the seceding ones. The protection of such interest grounds their right to establish their institutions in the land that they own. However, as long as this interest is protected, the seceding group and the state from which it has separated have merely competing liberty-rights to the control and use of the contested territory. Thus, neither group's political institutions may acquire absolute priority over the other. Accordingly, secession ought not to be an impediment to the survival of the existing state, nor should it be significantly burdensome for its institutions, provided that they are properly authorized. Thus, in some cases, the protection of the existing state's legitimate institutions may require that a group renounces secession altogether and seeks alternative ways to fulfill its ambitions of independence. In particular, if secession endangers the institutions of the existing state, the seceding group might have to ensure continued cooperation with it to ensure the provision of basic goods and services.

The group might be required to allow the state to which it belongs partial entitlements on its territory for the effective implementation of its functions, by for example resorting to federalism. These functions include the provision of basic goods and services, the ability to adjudicate between disputes and to enforce the law, and the effective coordination of all the central functions of its institutions. For example, Brussels is the economic center of both Wallonia and Flanders. If any of the two countries were to achieve independence and take control of Brussels, then the other would lose the economic means to be viable. The only option in this case is a multinational federalism.⁷⁵

Finally, if the state does not fulfill the requirements of legitimacy, the seceding party has no duty to ensure their proper functioning. It does, however, have some special duty towards the members of the non-seceding community. The separation should not constitute a sudden and radical worsening of the chances that the non-seceding individuals have to achieve self-government. In particular, the seceding party ought to continue honoring the contractual duties that emerge from economic activities

⁷⁵ Philippe Van Parijs, "Is a Bi-National Democracy Viable? The Case of Belgium," in *Nationalism and Binationalism. The Perils of Perfect Structures, Vol. 1*, eds. Anita Shapira, Yedidia Z. Stern, and Alexander Yakobson (Brighton: Sussex Academic Press & Jerusalem: The Israel Democracy Institute, 2013), 64.

across the newly established borders. There are two ways in which secession may worsen the wellbeing of the original community. First, secession may erode the chances that the original community may have to uphold legitimate norms. So, for example, if secession affects negatively the original community by reducing its chances to successfully meet the basic needs, or protect its members' freedom of association, then the right of the seceding group to separate may be curtailed.

The second preoccupation has to do with the fact that a sudden worsening of wellbeing may have negative effects on social cohesion, even if the original community is relatively well off and meets the requirements of legitimacy. In this case, secession may have to be gradual to reduce the possible disruptive consequences of a sudden worsening of the wellbeing of the members of the existing state. So for example, the secession of South Sudan in 2011 created duties on the two parties to continue cooperation with regards to sharing (at least temporarily) oil revenues, as well as sharing pipelines for the transportation of the South Sudanese oil through Sudanese oil pipes. This cooperation was warranted in virtue of oil's strategic importance for the Sudanese economy and its people's wellbeing. The heavy reliance of South Sudanese and Sudanese economies on oil revenues required the prioritization of such negotiation.⁷⁶

The situation resulting from compromise might come in the form of economic settlements to finalize complete independence, by ensuring economic cooperation for a reasonable length of time, so that the non-seceding individuals' wellbeing is not radically worsened by the separation. After a period of adjustment, the group and the non-seceding community achieve the status of independent communities, and the two groups owe to each other obligations equal to those they owe to any other group.

⁷⁶ This secession was the result of a violent conflict between the two communities that continues today. At the time of secession the negotiation did not result in an agreement on the oil revenues, and this contributed to the continuation of the conflict.

Chapter Eight - Conclusions

1 The Thesis

With this thesis I hope to have achieved two goals: first, to have made some order within the growing literature on territorial rights, and second, to have given one alternative approach that successfully addresses the complications emerging from existing theories of territorial rights. I have proposed an account that draws in the strongest arguments provided by the authors that have engaged with the issue of territorial rights until now. Most of the existing literature shares the intuition that territorial rights are in some important sense accorded to protect individuals' most fundamental interests in developing and pursuing their separate and collective goals. My proposal also appeals to this principle and makes it the central focus of a theory of territorial rights.

In Chapter 2 I have used the Hohfeldian analysis of rights to show that exclusive resource rights and powers over territory comprise of different normative incidents that are grounded on different moral concerns. For LBC, groups acquire freedoms and powers to use and control a territory if these are determined by the located social norms that they uphold. In Chapter 5 I have argued that social norms, regardless of their conformity to principles of legitimacy, protect individuals self-government by maintaining peace, establishing the grounds for stability of expectations, and offering individuals access to systems of values. However, these freedoms and powers are exclusive only if they are protected respectively by claims and immunities. In Chapter 6 I have offered the grounds of these protective normative incidents and suggested that social norms must be legitimate if they are to ground exclusive titles to territory.

Distinguishing between freedoms and claims, and powers and immunities allows for a more nuanced view of territorial demands and their permissibility. The combination of a conventionalist theory grounding freedoms and powers, and the concept of legitimacy grounding protective claims and immunities allows LBC to overcome the complications found in the literature. Because a group acquires territorial jurisdiction on the basis of its social norms, LBC does not suffer from the

in rem problem as only the group that occupies a certain territory may legitimately exert territorial jurisdiction there. Moreover, because social norms regarding territory and resources necessarily impinge on some particular geographical location, the conventionalist theory also fulfills the particularity requirement. Finally, by employing a conventionalist theory of rights on territory, LBC has the advantage of not needing a theory of original acquisition.

However, these titles are limited in so far as and to the extent that they meet some requirements of legitimacy. I have argued that the threshold of legitimacy is a minimal and negative standard of critical evaluation of the existing social norms of a community. This ensures that communities' territorial rights represent as far as possible the special interests and narratives regarding their attachment to territory making the proposal less likely to be subject to the charge of ethnocentrism and ensures its wide applicability. Because titles on territory are exclusive only to the extent that they are necessary to maintain legitimate social norms, and because the threshold protects minimal requirements of legitimacy, the theory is well equipped to respond to our intuitions that territorial holdings should be limited by the demands of global justice.

In Chapter 7 I have applied my proposal to the issue of secession. I have suggested that a group can secede if it has powers and freedoms with regards to the territory that its members occupy, and that it can claim exclusive jurisdiction over its territory and exclusive resource rights if its practices are legitimate. Since the threshold of legitimacy is likely to ground very limited exclusive rights, the parties to a secession are likely to be left with competing and overlapping freedoms and powers on the same territory and resources that are grounded on their located social norms. With regards to conflicts arising from overlapping freedoms and powers, the parties have a duty to compromise and find a mutually beneficial agreement.

I have only mentioned briefly in Chapter 7 the institutional component of secession. I have not examined it further because the aim of the chapter is to discuss the implications of LBC for a theory of the right to secede, and to show how compromise should look like in cases of overlapping and conflicting important interests. However, here I would like to expand briefly on the idea that a theory of secession must not only be concerned with establishing who has the right to

unilaterally secede, but also with addressing the nature of the institutional change demanded by state breaking within the wider institutional setting of the international community. I mention in Chapter 7, section 5, that political institutions emerging from secession ought to be authorized by their subjects. I suggest that the community's consent to the new institutions forms the basis for the international recognition of the new political group. The day of the declaration of independence, and the day in which the new political institutions acquire the support of their population, determines the birth of the new state in the eyes of the international community.

International recognition is at the moment chiefly accorded on the basis of *de facto* control of a territory and a population. However, I believe the international community should shift its focus on the accountability of the new institutions towards their subjects and towards the parties with which they engage in international relations. Although territorial jurisdiction is grounded on conventions, and is somewhat independent from the consent of its members, political institutions that act as representatives of the community in the wider context of international relations must acquire the consent of those that they represent. The consent of those subject to political institutions that engage in international relations is essential in the process of international recognition because political institutions that have a wide effect on large populations should be subject to more substantial scrutiny. The more complex the institutions and the more technical their powers are, the more they should be exposed to the review of their subjects, and the more they should be accountable for ensuring that tacit consent is given in the most appropriate conditions. Moreover, it is harder to evaluate the effects that the decisions of large institutions have on a population than it is to evaluate the effect of smaller political associations and groups, such as for example the head of an Amish community or the decision of a Maori tribe chief. The complexity of the relations between institutions and the lives of their subjects should be reflected in a review process that must include some indicator of individuals' preferences regarding those who hold power over them and, for the purpose of this thesis, regarding their territory.

2 Key Ideas

There are three ideas with which I engage throughout this work and that perhaps constitute its deeper message. It is difficult to say if these ideas informed the thesis from the start of this project or if they emerged as a product of the work done until now. However, in making them explicit here I hope to clarify the basic outlook that I think is proper to have with regards to territorial disputes and international relations, and the role that rights have in this debate.

The first idea is that territory is not the only and central object of global relations, self-determination, and political authority. Because of the centrality of the territorial nation states in modern political thought, it may seem that territorial control is a central and ineliminable aspect of political authority and international relations. However, many actors that are not properly territorial participate in international relations and the regulations of central issues, such as trade and the protection of human rights among others. I am thinking of international professional associations, non-governmental organizations, research institutions, and international arbitration tribunals, which participate to shape significantly the nature of international practice and the standards to which nations and subgroups should abide. Through these transnational institutions individuals have gained a central role in the process of accountability of nation states and international associations, which has brought these bodies back to the attention of the global public opinion.

Because territorial jurisdiction is not the only way a community may exert political authority, it should constitute only part of our concerns with regard to global obligations and the limits of jurisdiction over people. I do not believe that the territorial nation state is outdated in any relevant sense. But it is an institution that is constantly changing, and other structures are emerging within it and above it. When discussing international issues, then, we should make sure we are attentive to the complex power relations between different international agents, whether they are territorial or not, and look past and inside the nation state to address the moral principles guiding these alternative structures as well. If we accept that territorial rights do not make the whole of agents' political authority over people, then it will be clearer why in this work I have tried to separate the demands over territory from

wider demands of authority over people. The latter require that we examine territorial rights, but also and most importantly the reciprocal obligations that individuals have and under what conditions they may be permitted to coerce each other through the exercise of political authority.

The second idea that I believe is at the core of this work is a particular conception of legitimacy. I place legitimacy at the basis of the demands for exclusive titles to a particular territory or resource. The idea of legitimacy that I propose is a substantial rather than procedural concept, and the fulfillment of its requirements must be evaluated with regards to how well social norms achieve the aim that legitimacy protects. The requirements of legitimacy proposed are not only minimal, but they also must be understood as making up for a composite account of legitimacy that may be achieved in many different ways. This ensures that communities and their members are able as freely as possible to express the ways in which they think their most fundamental interests and values should be protected. I have suggested also that the legitimacy of some community's social norms will depend significantly on the system of legitimate communities within which it is embedded. Earlier I gave the example of the Amish community that meets the threshold of legitimacy because it is placed within the larger community of the United States, and because it accepts that its people may choose to renounce their role as members of the Amish and join the larger American community. Members of the Amish community may leave their community at great costs, such as losing the support of their family. However, by making this freedom available to their members, the Amish community ensures that the strict requirements that it imposes on membership are counterbalanced by the freedom of individuals to reject them and to join an alternative and sufficiently legitimate community.

Evaluating the legitimacy of a community's social norms by taking into consideration its interdependent features with the standards of legitimacy of other communities incentivizes groups to uphold practices of open borders and intergroup cooperation. In fact, if groups participate in a system of legitimate and open communities, they can ensure that they will have the widest discretion with regards to the requirements for internal membership. The interconnection of the legitimacy of social norms with the system of legitimate communities may further global cooperation, may offer

individuals a diverse array of opportunities to pursue their life plans and widen their options, and ultimately may contribute to furthering a culture of toleration and free circulation of ideas.

The third key message that I want to clarify is that communities' territorial rights should be considered fluid and subject to change when the circumstances affecting the use and the availability of land and resources also change. I have employed a conventional theory of territorial rights and argued that conventions may not establish any exclusive title to territory without also meeting a legitimacy threshold. I find a theory that leaves little space for extensive exclusive rights to territory appealing because the assertion of claims and immunities can exacerbate conflicts. This is true especially when the parties to the dispute do not share a commitment to the same values and moral outlook, and thus when they demand rights on the basis of values and interests that the other party may not understand and accept. The fact that the assertion of exclusive rights may aggravate disputes is not *per se* a reason to reject exclusive rights altogether, but it is a reason to ensure that we are careful in dispensing them.

Clarifying which interests have more weight than others to the extent that they should be protected by claims and immunities serves as a solid starting point for the pursuit of successful intergroup cooperation, despite the obstacles posed by resentment and disagreement. In Chapter 6, I argue that as long as rights sufficiently protect individuals' ability to form and pursue their life plans, we may want to establish some claims and immunities against others' intervention in communities' affairs. The parceling of territory in exclusive holdings, however, can only be partial and subject to the changing circumstances regarding the use and availability of territory and resources. If everything goes as environmentalist studies suggest, then there is going to be less land for an increasing number of people. Thus, we need less conflict and less entrenched privileges, and more space for cooperation and negotiation. I believe LBC supports this idea by entrusting the international community with the role of providing the assistance needed for the creation and modification of titles to territory on the basis of continuously emerging demands for a more equitable distribution of territorial holdings.

3 Further Developments

This thesis is far from being the final word. Throughout the text I have set out ideas that need further analysis, and the development of which would enrich the debate about territorial rights in particular and global justice in general. Firstly, the idea of compromise can be developed further, in particular with regards to two aspects: the method to employ to evaluate the strength of important but competing interests, and the nature of the institutions that should carry on the task of mediating between parties in conflict. There is a growing literature on compromise and territorial rights and on how compromise must be distinguished from mere bargaining and negotiation. I believe that the theoretical debate about compromise could be enriched with the introduction of insights from the legal theory of the doctrine of the balance of interests and from the social sciences in identifying the key factors contributing to the effectiveness of norms in protecting individuals' rights.

Moreover, there is space for an analysis of the type of institutions that are appropriate in carrying on the task of aiding the negotiations between conflicting parties. In international practice there have been different actors entrusted with this role. For example, in the case of Pakistan and India I have discussed the World Bank involvement, which was accepted as the way out of the conflict by both parties (albeit with difficulty). Other examples are the African Union that has been entrusted with monitoring the consultations leading to the South Sudanese referendum and the post-secession negotiations. The case of South Sudan is particularly interesting also because the agreement between the two emerging states did not include the control of the region of Abyei. The group controlling the contested area is currently asserting independence and has sought different ways to further its aims, including recourse to the Permanent Court of Arbitration. The choice between the various agents that may aid negotiation is often made on the basis of convenience and expected results. A principled analysis of which actors should be called in assisting the achievement of a successful compromise would help uncover the values that compromise must further, and it would reduce the risk that the most powerful actors will see their interests protected at the expense of the weakest ones.

In this work I have concentrated in proposing the foundation of a theory of territorial rights and I have examined only its implications for a theory of secession. However, a theory of territorial rights has something to say about at least five other issues that have to do to a large extent with the control and use of territory and resources. Further research will have to address the analysis of the implications of a theory of territorial right for immigration, for the rectification of historical injustice, for the issue of environmental refugees, for the discovery and acquisition of new land and resources, including the deep seas and outer space, and for a theory of military intervention.

In Chapters 5 and 6, I sketched the position that LBC has towards the issue of immigration and historical injustice. However, LBC needs to be integrated in a larger discourse regarding our global obligations to address these issues thoroughly. I have suggested that migrants should be divided in two classes, refugees and immigrants, and that the former have some claims that the hosting community allows them to flourish within its territory. The latter, instead, can assert some freedoms and powers with regard to important interests that it has developed within the hosting community's territory, but these interests must be reconciled with the important but non-fundamental interests of the hosting community itself. The immigrant's and the refugee's titles must not endanger the interests of the community's members in a stable and legitimate system of expectations and possessions, and for this reason they may not challenge individuals' property rights there. But they may demand that the community integrates the migrants' interests in the larger system of social norms that regulates the distribution of resources and the freedom to occupy and thrive within its territory. These intuitions ought to be integrated with a theory of immigration and of the benefits that it can have on the hosting community, including the benefits of an open border policy for the system of legitimate communities and international relations.

I have also briefly indicated how LBC may address issues of historical injustice. For the conventionalist approach, territorial disputes regarding past wrongs must be addressed as a clash of existing interests in currently contested territories. Those who have lost land because of an injustice should be allowed to participate in the determination of new territorial rights and reach a compromise with the existing

occupiers of their past territory, as long as traces of their past territorial rights are detectable. The weight of their current interests and the residual responsibility of the wrongdoers' descendants will have to be taken into consideration when balancing existing legitimate and overlapping interests. The proposal sketched in Chapter 5 needs to be developed, in particular with regards to the idea of residual responsibility of the descendants of the wrongdoers, as well as the idea of residual entitlements of the community that was wronged. These are not issues strictly related to territorial rights, and they have largely to do with the permanence of groups and their obligations throughout time. Admittedly, the conventionalist theory is not suited to provide a clear idea of the span of a group's identity, given that conventions change as new members join the community and that the identity of the group changes with the conventions that emerge from new interactions. Addressing the issue of historical injustice may prove challenging for LBC, but it may also provide the opportunity to reconsider the classic literature on historical injustice with an alternative and potentially radical view.

Finally, I believe that LBC has something to say also with regards to the issues of environmental refugees, military intervention, and the discovery and acquisition of unowned resources. I do not engage with any of these topics in this thesis, but these issues should be addressed before this work becomes a robust alternative to the existing literature, and a serious attempt at providing guidelines for sustainable policies and fairer international relations. In particular, it is crucial to identify the role that a debate on territorial rights may have in determining our decisions regarding how we should treat people dispossessed of their territory, what should be the principles that lead the acquisition and discovery of new land and resources, and whether we should respect the territorial holdings of oppressive and violent regimes.

By the end of Chapter 6, I suggest that international practices must be considered grounding titles, just as much as local and national practices. I believe that regardless of the imperfection of the current system of international law and its practices, we have an interest, if not an obligation, to seriously consider the possible improvements that could be realized without disrupting the present achievements. Thus, the initial step towards the development of LBC will likely be a principled

analysis of the practices and the law that are currently upheld with regards to the issues listed above.

The international community has developed principles to address these three issues, and although the existing solutions are wanting, they offer a solid starting point towards the development of theoretically sound guidelines. For example, the protection of refugees currently is limited to ensuring the means of survival of the people that have suffered displacement because of the active violation of their basic rights from the political institutions to which they are subject. The literature has for the most part chosen to treat environmental refugees as belonging to the class of political refugees. However, there are important differences between these two classes of people, not least the fact that the status of ecological refugee is not the consequence of the active violation of human rights from political institutions. I believe that an analysis of the laws on statelessness together with the international law principle of self-determination may lead political philosophers to consider a different set of territorial rights for environmental refugees.

Similarly, international practice provides some ideas on how to address the discovery and the acquisition of unowned resources. Currently, the discovery and acquisition of unowned resources follows at times the principle according to which the Earth is held in common, or the principle that holds that who discovers the resource owns it, or the principle for which the resources found in a territory belong to the nation of the people occupying that territory. There is confusion regarding which principle applies in which situation, but some interesting ideas can be retrieved from the way international practice has regulated the control of some complex issues, such as the open sea and the commercial air traffic. For example, the idea that resources that are important for everyone should be held in common has contributed significantly towards much of the international cooperation and the harmonization of rules regarding commercial air transportation. Although imperfect and tainted by power struggles, international agreements often hide some principled solution to pressing issues. I believe that pursuing the clues that successful practices provide may be of great aid in the development of a principled and robust set of guidelines for tackling emerging disputes about the discovery and use of new land and resources, including those found in outer space.

Lastly, with regards to the issue of military intervention, LBC is perhaps pointing at solutions that are in sharp conflict with the current principles informing international law. First, LBC does not offer a justification of states' territorial integrity since states may legitimately demand very limited exclusive titles to territory. LBC, in fact, permits secession as long as state breaking does not endanger individuals' basic interests in self-government. Also, states may not demand extensive rights on the resources found in their territory, but can assert claims to natural resources only to the extent that these are necessary for the protection of a system of legitimate social norms. Second, LBC also rejects for the most part interventions aimed at disrupting existing social orders, regardless of the orders' wickedness.

In Chapter 5, I have listed three reasons why social norms, even if illegitimate, should demand some type of respect from outsiders. Chiefly, military intervention should be avoided in all those cases where it may disrupt legitimate – albeit unjust – social arrangements, given our commitment to ensuring that peace is maintained and that individuals are able to rely on a stable system of expectations and possessions. Moreover, existing social norms should be respected to the extent that they offer their subject a set of options and values that allows them to form and pursue life plans and directive ends. However, the issue of justified military intervention does not address only peaceful but unjust social orders. It addresses also cases in which continuous civil war is a threat to its own system of social norms and the safety of its population. Nevertheless, the analysis of a community's territorial rights (or lack thereof) from the perspective offered by LBC may constitute the starting point of a wider account of the remedies that are available against the violation of the most basic human rights.

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